

## Service

Labor &amp; Employment

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## Missouri Court of Appeals Affirms: Pet Sitters Are Not Independent Contractors

On October 27, 2020, in *417 Pet Sitting, LLC v. Division of Employment Security (Pet Sitting LLC)*, the Western District of the Missouri Court of Appeals affirmed the decision by the Missouri Department of Labor, Labor and Industrial Relations Commission that workers engaged to work as pet sitters were employees and not independent contractors. The Court applied the Internal Revenue Service's 20-factor "right-to-control" test to review the Commission's assessment of the employment status of the sitters. The Court's decision will make it more difficult for employers to classify workers as independent contractors and is in sharp contrast with both existing Missouri law as well as the federal Department of Labor's recently proposed rule on independent contractors under the Fair Labor Standards Act, which we discussed in a recent commentary.

### Key elements of the business relationship

Pet Sitting LLC (Pet Sitting) offers residential pet care and pet-sitting services to Pet Sitting's clients by providing and compensating numerous sitters to provide in-home sitting services. The business model adopted by Pet Sitting establishes that Pet Sitting:

Is able to meet the demands of its clientele because it compensates numerous sitters to provide residential pet care services;

Advertises for sitters by urging them to become "part of a team";

Bonds and insures its sitters;

Permits clients to schedule visits and free consultations on its website;

Controls sitter and client assignments;

Requires sitters to meet the client in the client's home, to follow client instructions and to input client notes into an online database;

Has an ongoing relationship with its sitters, counsels and advises sitters about their duties and client complaints, retains the right to remove sitters from assignments at any time while sitters remain able to decline assignments;

Executes independent contractor agreements with the sitters;

Precludes sitters from assigning rights under the contract or delegating the performance of their duties under the contract without the prior written consent of Pet Sitting —evidence indicates that sitters are not permitted to utilize helpers;

Requires sitters to report hours on an online time-reporting system used to invoice the client — sitters are paid for completed services regardless of whether clients pay Pet Sitting;

Does not reimburse sitters for travel expenses but only for “reasonable and approved out-of-pocket expenses.”

## **Employer exerted control sufficient to establish an employment relationship**

The Court determined that 13 of the 20 IRS factors indicated that Pet Sitting exerted control over the manner and means of the sitters' performance sufficient to establish that the sitters were engaged as employees for Pet Sitting. Critical to the Court's assessment of the relationship between Pet Sitting and the sitters were the following factors:

Instructions: Pet Sitting retains and exercises control over the timing and manner in which the sitters perform services by controlling sitter assignments, counseling sitters on client complaints, imposing contractual obligations on sitters to fulfill duties requested by Pet Sitting, and retaining the ability to remove sitters from their assignments or terminating sitters for failing to comply with the reasonable directives of Pet Sitting.

Integration of workers' services: Although Pet Sitting argued that its purpose was to provide a matching service between sitters and owners, the evidence established that Pet Sitting exists primarily to provide pet care services to clients. The sole owner of Pet Sitting personally provides pet-sitting

services to clients, but the services of other sitters are integral to operating the company on a larger scale to meet the needs of clientele. Pet Sitting also advertises their sitters as being “part of a team.”

Services personally rendered, and the hiring, supervising and paying of assistants: The sitters’ obligation to undergo an application process and background check and to personally meet with the client before rendering services, the prohibition in the sitters’ contract against assignment or delegation of services, Pet Sitting’s refusal to permit its sitters from hiring assistants, and Pet Sitting’s decision to individually bond its sitters established that Pet Sitters retains control over the method and manner of pet care provided by the sitters.

Continuing relationship: The relationship between Pet Sitting and its sitters does not cease at the end of a particular assignment but continues with the sitters’ re-assignment to another client and with semi-annual reviews of the sitters’ contract.

Right to discharge: Pet Sitting conceded that it had the right to discharge its sitters at any time as expressed by the terms of its contract with the sitters. The ability to discharge workers enables Pet Sitting to control workers through the threat of dismissal.

Order of sequence set: While Pet Sitting does not control the specific routines associated with the care of a pet, Pet Sitting controls the sitters’ routines with respect to the number of clients serviced on a particular day and schedules the sitters to accommodate the needs of more than one client. In addition, Pet Sitters also retains the right to determine order or sequence of services by controlling removals from an assignment and the right to terminate a sitter.

Significantly, the Court did not consider the location of the performance of services as relevant to the analysis of the employment relationship because the nature of the services, in-home care of pets, cannot be performed at Pet Sittings’ offices. (This critical element – that the services are provided at the clients’ homes and not at the putative employers – is glossed over by the Court.) The Court also did not find that the absence of fixed hours supported a finding of an independent contractor relationship. Instead, the Court concluded that Pet Sitting continues to exert control over the sitters’ assignments, so it weighed the absence of fixed hours neutrally.

Curiously, few would expect that asking a friend or relative to “watch” a pet (presumably at times dictated by the pet owner) would establish an employment relationship between the pet owner and friend or relative. Unlike here, the Court found the pet sitters to be employees.

### **What this means to you**

The Missouri Court of Appeals decision will make it more difficult (perhaps much more difficult) for employers to classify employees as independent contractors. Employers should review their employment relationships with workers currently designated as independent contractors and assess the amount of control exercised or reserved by the putative employer over the means and methods by which workers perform the job tasks.

It is important to note the contrast between the Missouri decision and the new independent contractor rule proposed by the federal Department of Labor (DOL). To be clear, the DOL's proposed independent contractor rule does not impact state laws regarding assessment of a worker's status as an independent contractor. But, to give some perspective, the federal DOL's proposed rule, as currently written, likely would discount the significance of compliance with certain contractual terms ordinarily used in relationships between businesses and give less weight to Pet Sitting's control over certain aspects of job performance. In addition, under the federal rule, there likely would have been more discussion regarding the opportunity for sitters to work for competitors of Pet Sitting, an issue not directly addressed in the decision. However, with the incoming Biden administration, we can expect the federal government to reverse its position on independent contractors, finding more relationships falling into the employer/employee realm.

### **Contact us**

If you have questions regarding the effect of the Missouri Court of Appeals decision on your business, contact Bob Tomaso or your Husch Blackwell attorney.

*Tracey Oakes O'Brien, Knowledge Manager, is a co-author of this content.*