

New Jersey High Court's *Weichert* Decision: Why Employers Should Review Their Independent Contractor Agreements Now

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Takeaways

- In *Kennedy v. Weichert*, New Jersey's highest court found a real estate agreement expressly designating that an agent is an independent contractor prevails over the state's Wage Payment Law.
- The Court held that the plaintiff was not subject to the well-known three-pronged "ABC test," which often governs employee classification disputes outside of the real estate context.
- This case of first impression overturned a lower court's holding that an agreement to an independent contractor affiliation is not determinative, but merely a relevant factor, and held that the agreed-upon designation is determinative of the agent's independent contractor status.
- *Weichert* instructs and reminds real estate brokerages, companies, and employers to carefully review their independent contractor agreements to ensure the agent's independent contractor status is clearly designated.

Related link

- [*Kennedy v. Weichert Co.*](#)

Article

New Jersey's highest court has held that an agreement between a real estate brokerage and a real estate salesperson identifying the salesperson as an independent contractor excludes the salesperson from the New Jersey Wage Payment Law (WPL), N.J.S.A. 34:11-4.1 *et seq.* [*Kennedy v. Weichert Co.*](#), No. 087975. The WPL governs compensation paid to employees and does not apply to independent contractors.

Case Background

The named plaintiff in the class action lawsuit, James Kennedy, was a licensed real estate salesperson who worked from 2012 through 2018 for defendant Weichert, a real estate broker operating offices nationwide, including throughout New Jersey.

The parties agreed that Kennedy would work as a Weichert salesperson as an independent contractor in writing in two agreements: (1) "Independent Contractor Agreement Between Broker and Salesperson" and (2) "Addendum to Independent Contractor Agreement between Broker and Salesperson." Nevertheless, Kennedy filed a putative class action alleging that Weichert violated the WPL by misclassifying him and other real estate salespersons as independent contractors and unlawfully deducting from their commissions marketing fees and other expenses.

Court Finds Affiliation Contract Controls

According to the Supreme Court, the New Jersey Real Estate License Act, commonly known as the Brokers Act (N.J.S.A. 45:15-1 *et seq.*), expressly provides that brokers and brokers-salespersons or salespersons may affiliate in an independent contractor relationship, “[n]otwithstanding any provision of [the Brokers Act] or any other law, rule, or regulation to the contrary.” The Court interpreted the legislature’s use of the word “notwithstanding” to signal the legislature’s intention that, if the parties’ business affiliation agreement under N.J.S.A. 45:15-3.2 conflicts with another law, rule, or regulation, the agreement will prevail.

In reaching this decision of first impression, the Court held Kennedy was not subject to the well-known three-pronged “ABC test” in *Hangrove v. Sleepy’s, LLC*, 220 N.J. 289 (2015), that typically governs employee classification disputes.

The ABC test presumes an individual is an employee unless the employer can make certain showings regarding that individual, including:

- (A) The individual has been and will continue to be free from control or direction over the performance of their service, both under contract of service and in fact;
- (B) Their service is either outside the usual course of the business for which such service is performed, or their service is performed outside of all the places of business of the enterprise for which such service is performed; and
- (C) The individual is customarily engaged in an independently established trade, occupation, profession or business.

Citing N.J.S.A. 43:21-19(i)(6).

Instead, if the parties agree in writing to an independent contractor relationship, the Court held, that agreement is dispositive. The Court thus overturned the lower court’s holding that the parties’ agreement to an independent contractor affiliation is not determinative but is merely one relevant factor to consider in the classification analysis.

Real estate brokerages, companies, and employers, especially in New Jersey, should carefully review the language in their independent contractor agreements considering the *Weichert* decision and applicable law.

Please contact the Jackson Lewis attorney with whom you normally work if you have questions about the *Weichert* decision, compliance, or the interaction between real estate and employment law more generally.

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