

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

**INTERPRETATION NO. 257**

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Limited Partnership Agreement

The question has arisen: Where a group of barbers who have executed a written agreement called a "limited partnership agreement" the terms of which provide that the contribution of the limited partners shall only be their "time, knowledge and experience" and which provides for the compensation of both the limited partner and the general partner by a weekly distribution of sixty to seventy percent of the receipts generated by each partner plus a yearly distribution of one percent of the remaining net profits of the partnership to each limited partner and ninety-six percent to the single general partner, whether the barbers named in the agreement as limited partners are employees in the employ of the barber named as the general partner?

N.C.G.S. Chapter 59 provides that in order to form a valid limited partnership, the provisions of the limited partnership act must be substantially complied with in good faith, N.C.G.S. 59-2(b), and further provides that "the contributions of a limited partner may be cash or other property, but not services". N.C.G.S. 59-3.

Additionally, where a third-party creditor sued a member of a partnership, characterized by a defective partnership agreement as a limited partner, for a debt owed by the insolvent partnership, it has been held that the effect of the unsuccessful attempt to form a limited partnership is the formation of a general partnership. Atlanta Stoveworks, Inc. v. Keel, 55 N.C. 421, 121 S.E.2d 607 (1961).

It is concluded that on the facts stated, the relationship of the barbers is that of general partners. The parties clearly intended to establish a partnership of some kind and just as clearly failed to establish a limited partnership due to the contribution of services as the sole contribution of capital by the "limited partners". The legal effect of their agreement, in light of the Keel case, appears to be the formation of a general partnership with the "general partner" occupying the position of managing partner.

While it is true that a limited partner may also be an employee of the partnership, the parties in the case at hand, by their solemn written undertaking, expressed no intent to form an employer/employee relationship either by or in addition to their partnership relationship.

Additionally, while the relationship that obtains between the parties to this agreement, particularly as regards the powers and duties of the barber named in the agreement as the “general partner”, exhibits certain of the common law indicia of employer/employee relationship, many of these powers and duties are not inconsistent with the powers and duties of a managing partner of a general partnership. That being the case, it would appear very difficult to establish that the “limited partner” barbers were in employment as that term is defined in the Employment Security Law.

The conclusion reached herein does not necessarily mean that in every case where a group of persons attempt or claim to form a limited partnership, no employment relationship can be found. For example, an employer/employee relationship might be found where:

- (1) The executed agreement provided for the voiding of the agreement if a limited partnership were not formed;
- (2) Where the facts and circumstances surrounding the carrying on of the business enterprise showed an employer/employee relationship in addition to the partnership relationship.
- (3) Where the right to manage the business or the participation in the profits of the business were so severely limited as to negative any intent that the individual involved be a partner in fact (a state of facts that may have existed in the case at hand if the partnership agreement had limited the income of the “limited” partners to a sum certain);
- (4) Where the alleged partnership agreement is not in writing and the common law indicia of employment exists;
- (5) Where the ostensible partners, over a substantial course of dealing, have failed to observe the provisions of their claimed agreement.

Therefore, the determination of whether an employment relationship exists where an attempted limited partnership has failed must continue to be made on a case by case basis considering all the facts and circumstances arising therein.

Adopted as an official Interpretation by the Commission on August 27, 1982.