



1099s and Independent Contractors – What You Should Know

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Presented by

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If A Stripper Is Not An Independent Contractor, Who Is?

Presented by:

William D. Wright

Phone: (610) 230-2137

Email: wwright@laborlawyers.com

www.laborlawyers.com

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Benefits of ICs

- Big savings on labor costs
 - unemployment, workers' comp, taxes, benefits, etc.
- No concerns over wage & hour law compliance
- Avoid liability for most employment discrimination laws
- Avoid issues under OSHA and immigration laws

Many workers prefer the freedom of being classified as independent contractors, as well as possible financial incentives.

Who Cares?



- IRS
 - estimated loss of \$3 to \$5 Billion each year due to misclassification
- State Income Tax Agencies
- State Unemployment Tax Agencies
- Department of Labor
 - works in tandem with IRS
- Congress and State legislatures
- Big Labor and Unions
 - potential dues-paying members
- Class Action Lawyers

Risks of Misclassification

- Minimum wage, overtime, and other unpaid wages
- Back taxes
- Unemployment audits
- Social Security contributions
- Unpaid benefits
- Employment law violations
- Workers' Compensation coverage
- Penalties and fines
- Litigation costs and attorney fees

So What Rules Should I Follow?

Difficult to provide blanket recommendations, because different tests are applied in different situations:

- IRS & State tax departments
- Department of Labor
- NLRB
- Unemployment claims
- Workers' compensation claims
- State and federal courts



Key Factor

IC misclassification battles usually boil down to one determinative factor:

CONTROL

How much control does the business have over the worker?

Little control = IC classification might be OK

A lot of control = IC classification is likely problematic

Any Business Can Be a Target...

Onyx Club (Atlanta): Workers provided with a “Dancer’s Packet” containing rules and policies

Result: \$1.55 million settlement (June 2012)

Rick’s Cabaret (NY): Workers “micromanaged” by club, told no gum or body glitter allowed

Result: \$5 million adverse ruling (Sept. 2013)

Spearmint Rhino (national): Workers had to follow set schedules, and required to clock in and out

Result: \$12.9 million settlement (Oct. 2013)

Columbia Artists Mgmt. (New York)

Musicians on tour were treated very much like employees, with their lodging reimbursed and subject to drug & alcohol tests.

Result:

Appeals court loss, final judgment pending (Sept. 2013)

Lessons:

- **Do not pay expenses for your ICs**
- **Do not subject them to the same rules as your employees**

Bowlin Group (Kentucky)

Cable installers classified as ICs performed same work as other company cable installers classified as employees.

Result:

\$1 million settlement (May 2013)

Lessons:

- **Your ICs cannot be retained to do the same things as your employees**
- **Your ICs should be brought on to perform specialized tasks different from your employees**

kgb, Inc. (Pennsylvania)

Workers hired to quickly respond to text message research inquiries from general public.

Result:

\$1.3 million settlement with Dept. of Labor (Jan. 2013)

Lessons:

- **ICs cannot be integral part of business**
- **If you are retaining workers to perform the work that makes your business your business, you should probably classify them as employees**

Arise Virtual Solutions (California)

Workers hired to provide virtual business outsourcing were provided detailed scripts and extensive training before being allowed to make phone calls.

Result:

\$1.25 million settlement (Jan. 2013)

Lessons:

- **Avoid levying significant control over your ICs**
- **If you feel the need to provide extensive training to your ICs before allowing them to work, you should probably hire another IC instead**

American Family Insurance (Ohio)

Workers retained to assist as insurance agents were provided office equipment and forced to follow regular office hours.

Result:

Class action case approved (Aug. 2013)

Lessons:

- **ICs should provide their own tools and equipment to do the job**
- **Employees can be directed regarding working hours; ICs should not be treated the same way**

S.D. Union Tribune (California)

Newspaper delivery workers were asked to sign the best independent contractor agreement money could buy.

Result:

\$11 million settlement approved (Jan. 2014)

Lesson:

“The contract cannot always be binding...otherwise, every employer who wanted to avoid paying employment taxes could do so by drafting an IC contract, but then treat the worker exactly as though he or she was an employee...”

James Estate (Oregon)

Bookkeeper hired to administer estate signed top-notch IC agreement after having worked as an employee for several years, and performed bookkeeping work for no other employer.

Result:

\$379.16 tax assessment (Aug. 2013)

Lessons:

- **Employees who become ICs cannot do the same job**
- **ICs should preferably perform the same type of work for other companies**

In a Perfect World...

- Your ICs should be in business on their own, with their own tax ID number (not just SSN), business license, business cards, and possibly also assistants/workers
- You pay your IC by the job and not by the hour or the week
- Your IC submits invoices (not timecards) and is paid on a 1099 basis while remaining responsible for all taxes
- Your ICs carry their own insurance and are not provided any benefits or bonuses

A Few Final Lessons...

- ICs should have the opportunity to realize either profit or loss for their work
- ICs should not have business cards from your company
- Do not treat new hires or “temps” as ICs while you try them out (consider staffing companies, but be wary of joint employment situations)
- Don't give workers option of being employee or IC; you can't count on worker remaining “on your side” once problems arise
- ICs should pay for their own business expenses and licenses, and should have an investment in their own equipment necessary to do job (including stilettos)

What If We Might Have Messed Up?

An employment law audit to determine whether mischaracterization exists is the first step.

If problems are found, you have three basic options:

1. Do nothing and hope for the best.
2. Reclassify your ICs as employees.
3. Retain as ICs but restructure the working relationship to comply with the applicable tests.

A photograph of three business professionals in a modern office hallway. A woman in a dark suit and white shirt is smiling and looking towards two men in suits. One man is holding a smartphone. The scene is brightly lit, with a soft glow over the image.

Final Questions

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Thank You

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