

## EMPLOYERS

# Don't Get Caught in the Independent Contractor Trap

by ANTHONY KUCHULIS of Barran Liebman LLP

**A**New York law firm engages a new lawyer as an independent contractor to assist with drafting a brief. After a few weeks of work, the contractor is dismissed once the project is complete. The Courts later deemed the contractor to be an employee, required the law firm to pay unemployment and opened it up to additional exposure for the misclassification.



standard in certain fields for decades. And, even when businesses carefully evaluate their onboarding practices, confusion may persist based on the competing legal tests for determining a worker's proper status under federal law, state law and tax law.

Even when an employer revisits longstanding industry practice and identifies the proper legal test for determining whether a worker is an independent contractor, there is still a significant risk of error as the applicable tests use broad "factors" for evaluating employment status, making it a case-by-case determination. In so doing, employers are deprived of any certainty in their decision making process.

Employers should not underestimate this risk. The Department of Labor (DOL) and the Internal Revenue Service are currently working with states to re-classify tens of thousands of workers, and employers can end up owing significant back taxes and civil penalties. Misclassified workers can also file private claims.

When someone hired as a contractor files a lawsuit challenging her classification, she can recover more than three times her actual damages once penalties at the state and federal levels are factored in, as well as attorney fees (which can often surpass the total damages amount, if litigated through trial), and then there is the risk of a class action lawsuit. Based on the number of employers potentially out of compliance, the grey area of the law, and the potential recovery from a lawsuit, it is not surprising

these claims have become prevalent.

Even an experienced employer or human resources professional may, incorrectly, believe this risk does not apply to them. Perhaps their contractors have signed agreements acknowledging their status, or maybe the contractors themselves have asked for contractor status to allow greater flexibility and increased take-home pay.

However, such actions will not insulate an employer from liability. A person's desire to work as an independent contractor, at least initially, will not prevent them from later filing a lawsuit alleging they should have been an employee. Further, employers should never assume that, because they get along with someone now, they will not risk litigation later from that same person challenging his or her employment status later. Hearts and minds change. Every bitter divorce once began as a blissful marriage. A prudent business person understands this fact and takes the steps necessary to mitigate potential liability.

The first step to avoid this trap is understanding the law. The DOL's 2015 Guidance requires employers to examine the classification of workers under the "economic realities test." Those factors include reviewing whether the worker is engaged in the core function of the business; risks losing his own investment; has a special skill or is controlled by the employer.

Oregon law goes further, often requiring independent contractors to hold themselves out as a separate business and having a separate office apart from the putative employer. In

short, the state and federal regulations seek to root out all but the most clear independent contractor relationships.

Businesses should then take proactive steps to examine their potential exposure. Employers should regularly vet their workforce for persons designated as "contractors" assisting with the core functions of the business. For a more nuanced approach, an employer should evaluate classification using a checklist that includes the legal requirements for contractor status.

If you believe a worker may be misclassified, you can (and should) re-classify them and formalize the employment relationship after speaking with your employment law counsel. In the process, ensure compliance with payroll requirements and withholdings, break times, sick time and family leave, and overtime laws.

Importantly, the law requires employees to provide notice of potential claims to be eligible for the maximum amount of penalty wages allowed under the law. If you receive a notice from an employee of an alleged minimum wage or overtime violation (whether due to a misclassification or otherwise), assume it is serious and a precursor to a lawsuit. Do not ignore it. The sooner the demand is reviewed and evaluated, preferably by an employment law attorney, the better chance you have of avoiding, or at least limiting, potential liability.

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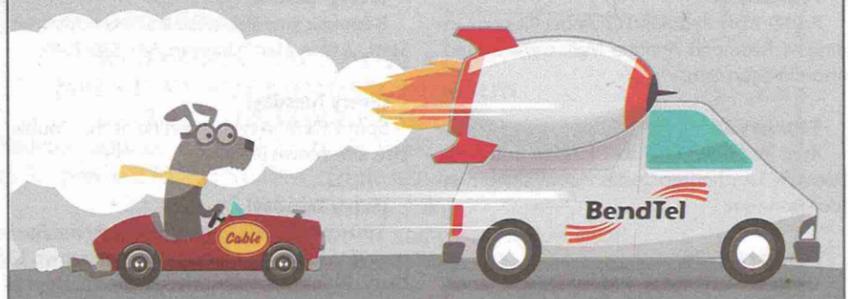
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