

Employee vs. Independent Contractor: Drafting Agreements That Protect

By Dominic A. Santos • Wood & Porter • San Francisco

I recently participated in National Constitution Center's one-hour telecast entitled *Employee vs. Independent Contractor: Drafting Agreements that Protect*. The seminar was led by Ari Karen, a partner in Venable's Washington, D.C. office. Karen is a labor and employment litigator helping clients comply with wage-hour, labor and employment regulations, and defending clients against claims of harassment, discrimination, ADA, ERISA and minimum wage and overtime violations.

Proper classification of workers as independent contractors or employees is a big topic these days. This short seminar examined the steps companies can take in drafting independent contractor agreements, and the importance of carrying out the terms of those agreements. It addressed "do's and don'ts" to help reduce the risk of misclassification. Misclassification can lead to disputes with workers as well as unwanted and protracted inquiries from state and federal governing bodies.

Nuts and Bolts

As you might expect, contract language is critical, as the contract serves as the basis for the relationship between the worker and the company. The contract can help provide evidence of the parties' intent, help define the level (or lack!) of control the service recipient has over the worker, and outline rights that may be indicative of independent contractor status (such as the right to hire assistants or delegate work).

Another important aspect of drafting is creativity with a specific industry. For example, if compliance with laws or regulations requires exclusivity between the worker and the company, such as in banking, attendees were urged to detail such requirements and cite the laws or regulations in the contract language. Exclusivity is normally indicative of an employment relationship, but when it is a legally required, it tends to be neutral.

If a legal dispute arises between the worker and the company, or an IRS audit takes place,

the contract will be everyone's Exhibit A. Nevertheless, it should come as no surprise that the contract is not dispositive whether a worker is an employee or independent contractor. Beyond the contract, other rules, manuals, policies, memos and correspondence can all factor in, as can experience on the ground. If real life is quite different from the documents, real life will control.

This underscores the seminar's most important advice in preparing for potential disputes or audits: record-keeping. A paper trail documenting the actual role and function of the worker can go a long way in supporting the independent contractor agreement. What really goes on between company and worker will be relevant. That makes the worker status question enormously fact-intensive.

Big Field

This seminar is a great introduction to the world of independent contractor status. It is not possible to cover every nuance, even focusing strictly on the federal tax side would be a tall order. State tax laws, unemployment law, worker's compensation, federal and state employment law, tort law and many other messy contexts are all relevant in this increasingly important field.

An audio recording of this seminar is also available for purchase through National's Web site, and a purchase of that audio includes all of the course materials. For more information about this telecast or other the seminars, programs, courses and books from National, visit www.constitutionconferences.com or call (800) 859-8676.

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