

## Pole Dancers: Employees or Contractors?

By Robert W. Wood

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Exotic dancers, aka strippers, may or may not be highly skilled workers, depending on your world view. This is no idle barroom question. Along with many other factors, it can affect whether they are classified as employees or independent contractors. That, in turn, can be a significant issue.

Exotic dancers have received a decided boost from the courts in the area of worker classification, giving them more support than a push-up bra. Their bump (and grind) in pay came in an employment dispute hailing from Boston, the setting for the Scorsese picture *The Departed*.<sup>1</sup> Unlike the Jersey site of Tony Soprano's beloved Bada Bing, this case involved a real-life strip club festering in Boston's Chelsea neighborhood, King Arthur's Lounge. By all appearances, both employer and patrons are disgruntled that *The Sopranos* is now relegated to reruns. Let's just say many patrons are in the "waste management" business.

### A. Goombah Setting

Sitting near Boston Harbor and Logan Airport, the city of Chelsea is directly across the Mystic River from Boston. The city dates to 1624, and like Chelsea, King Arthur's club has a storied history.

In 2008 a man opened fire in King Arthur's, killing one man and wounding two others as patrons and employees alike scrambled for safety. The alleged gunman, Jesse Camacho, was arrested nine months later in Mexico City.

But that was a mere scuffle compared with the King Arthur brawl in 1982. Sparked by an argument between Alfred J. Mattuchio and an off-duty police officer, it only

simmered at first. The officer departed King Arthur's, returning later with a cadre of police officers armed with nightsticks, baseball bats, and tire irons.

The police officers bludgeoned a dozen patrons and employees. In the melee, Vincent J. Bordonaro was beaten to death. Four of the officers were indicted, and three were convicted. Plus, the City of Chelsea was found liable in a civil case.

That's all background befitting a Scorsese movie. Yet as you'll see, our stripper story is a kind of morality tale with universal themes. How did these strippers successfully take on their employer and why?

The answer lies in the odd intersection of tax and employment law. Dancers at King Arthur's sued the proprietor claiming that despite their independent contractor labels, they are really employees. Disputes over worker status are becoming commonplace, and are often brought by government agencies. They may include the IRS, state tax authorities, worker's compensation or unemployment insurance authorities, the U.S. Department of Labor, etc.

Increasingly, however, this worker status issue is cropping up in civil litigation. For example, if a delivery driver runs over someone while driving as an independent contractor, only the driver is liable. Yet if the driver is determined to be an employee, the employer is also liable. The injured party may sue, attacking the bona fides of the working relationship as a way to reach the employer's assets.

Sometimes the lawsuit is not brought by a third party but rather by the workers themselves, usually for overtime or employee benefits. Employers often have a particularly hard time understanding how this is possible. After all, in most cases the workers have signed a contract that states they will be treated as independent contractors, forgoing any right to employee benefits.

Shouldn't a worker be estopped from later denying the validity of a contract, many employers ask? The courts have not seen it that way. In fact, the courts have repeatedly said that one's status as an employee or independent contractor is not simply a matter of contract.<sup>2</sup> It is a legal and factual question. Whatever the parties may have agreed, it doesn't bind either government agencies or private parties in civil disputes.<sup>3</sup>

<sup>2</sup>See cases collected in Robert W. Wood, *Legal Guide to Independent Contractor Status* (4th ed. 2007).

<sup>3</sup>See *Borello v. Dept. of Indus. Relations*, 48 Cal. 3d 341, 349 (1989); see also *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996), *Doc 96-27532*, 96 TNT 199-10, *reh'g en banc granted*, 105 F.3d 1334 (9th Cir. 1997), *Doc 97-4852*, 97 TNT 33-4, *cert. denied*, 522 U.S. 1098 (1998).

<sup>1</sup>See *Chaves v. King Arthur's Lounge*, No. 07-2505 (Mass. Superior Ct., July 31, 2009).

## B. Defining Employees

Surprisingly, there's no universal test for defining employees. The IRS uses one test, the Department of Labor (and many employment statutes) use another, and most state unemployment insurance authorities use another still.<sup>4</sup> Yet most of the tests are similar.

In large part, they focus on the common-law right to control the worker.<sup>5</sup> The IRS formulation<sup>6</sup> is particularly noteworthy, since it sets out 20 of the most important factors in worker classification:

1. **Instructions.** The more instructions the employer gives the worker, the more likely the worker is an employee.
2. **Training.** The more training the employer gives the worker, the more likely the worker is an employee.
3. **Integration.** The more closely integrated the work is with the employer's business, the more likely the worker is an employee.
4. **Services rendered personally.** If the worker must personally do the work, that tends to suggest employee status.
5. **Hiring, supervising, and paying assistants.** A person who hires, supervises, and pays his own assistants is more likely to be an independent contractor.
6. **Continuing relationship.** The longer the arrangement's term between company and worker, the more likely the worker will be considered an employee.
7. **Set hours of work.** Set hours (such as 9 a.m. to 5 p.m.) are more consistent with employee status.
8. **Full-time required.** Working full-time is more consistent with employee status.
9. **Doing work on employer's premises.** Working on the employer's premises (as opposed to from home or from a neutral site) is more consistent with employee status.
10. **Order or sequence set.** Performing services in a particular order or sequence set by the employer is more consistent with employee status.
11. **Oral or written reports.** If a worker is required to render regular reports to an employer, it tends to suggest employee status.
12. **Payment by hour, week, or month.** Payment by the hour, week, or month (rather than a lump sum paid by the job) tends to suggest employee status.
13. **Payment of business and traveling expenses.** An employer's payment of business and traveling expenses for the worker tends to suggest employee status.

14. **Furnishing of tools and materials.** If the employer furnishes significant tools, materials, and other equipment to a worker, it tends to suggest employee status.

15. **Significant investment.** A worker's own significant investment tends to indicate independent contractor status.

16. **Realization of profit or loss.** A worker's potential to realize a profit or to suffer a loss tends to suggest independent contractor status.

17. **Working for more than one firm at a time.** Working for more than one firm at the same time tends to suggest independent contractor status.

18. **Making services available to the general public.** The fact that the worker makes his services available to the general public on a regular and consistent basis tends to suggest independent contractor status.

19. **Right to discharge.** The company's right to discharge a worker tends to suggest employee status.

20. **Right to terminate.** A worker's right to terminate the relationship without incurring liability to the company suggests employee status.

Unfortunately, there's no litmus test for how many or how few factors one needs for one category or the other. That can be maddening, especially to business people who want clear guidance about what they can and cannot do. Some factors are intuitively more important than others, but there's no magic bullet.

To make a decision one needs to examine all of the facts and circumstances. This takes time and energy and is inherently subjective. That makes these disputes terribly fact-intensive. Not only will the written contracts and other documents be scrutinized, but the actual practices and day-to-day interaction between worker and company will be examined as well.

Indeed, even the most carefully written independent contractor contract may not save the employer from employee treatment if, despite the written contract, the employer treats the worker as an employee. Expert testimony is becoming a common feature of such litigation. It can be a bit like mud wrestling.

## C. Dancing Queen

Even strip clubs and strippers are not immune from the vicissitudes of their disputes. Strippers at King Arthur's sued for wages and benefits as a class, saying they were largely ordered what to do and how to do it. That made them employees, they claimed. They earned no salaries or wages, and were required to pony up \$35 as rent to perform each night.

Yet from the club's perspective, these girls were independent entrepreneurs. So you think you can dance? Pay up first. The club structured the arrangement as a business deal, with dancers getting to keep \$10 of every \$30 for "private dancing" in secluded booths.

Despite the craftiness of King Arthur's proprietors, however, one of the key features to the court was the integration of the strippers into the club. This integration factor — just how central the workers are to the business

<sup>4</sup>For discussion of each, see Wood, *supra* note 2.

<sup>5</sup>*Id.*, at para. 3.02B.

<sup>6</sup>See Rev. Rul. 87-41, 1987-1 C.B. 296.

of the employer — is another factor that is usually examined in worker status disputes. The club argued unsuccessfully that selling alcohol was its main business. Strip shows, it argued, were merely incidental.

The club even had the temerity to argue that these “independent” dancers merely provided extra entertainment — like televisions at a sports bar. The judge disagreed, ruling dancing to be integral to King Arthur’s business. The judge granted the dancers’ motion for summary judgment on liability.

The question now is what damages they will receive. Predictably, there’s a dispute about that too. The dancers contend that they weren’t even making the state’s required minimum wage of \$2.63 per hour. In contrast, club owners say some girls earn hundreds of dollars a night. Stay tuned for more in this unfolding drama.

#### D. Perennial Dance Party

This isn’t the first time worker status issues have reached the club dance floor and beyond, even extending to the dark corners of the adult entertainment industry. There have been a number of disputes between the IRS and companies operating dance theaters, fantasy booths, and other venues for adult entertainment.

The clubs are typically being chased for withholding and employment taxes, so they argue their performers are not employees.<sup>7</sup> Generally, dancers pay rent and receive a cut of fees at the club. A written contract usually states that they pay their own taxes and work when they want.

Unlike many independent contractors in other lines of business, however, clubs often impose detailed rules and regulations. Some even levy fines for prohibited conduct. Still, those powers may not be strong enough to result in the kind of control that usually equals employee status.<sup>8</sup> And despite the dancers’ recent victory against King Arthur’s, the clubs often do well in these disputes.

In a number of these cases, clubs have prevailed, upholding the independent status of their dancers. If they can beat the IRS, some nightclubs are emboldened to seek to collect attorney fees. The government can be forced to fork over the attorney fees expended by a taxpayer if the IRS’s position on a matter is “substantially unjustified.”

In *Marlar Inc. v. United States*,<sup>9</sup> a court awarded attorney fees to a nightclub that successfully defended its independent contractor relationship. The court held that the club reasonably relied on industry practice in treating

its nude dancers as “lessees.” The government was not substantially justified in pursuing employment tax claims against the club, so the club won attorney fees, according to the court.<sup>10</sup>

#### E. Uniform Practices

Even if a company loses a tax case about worker status, the employer can normally find an escape valve by showing that it was the industry’s “uniform practice” to treat these workers as independent contractors. Some cases suggest the industry practice does not even have to be uniform. In *303 West 42nd Street Enterprises, Inc. v. IRS*,<sup>11</sup> the district court granted summary judgment to the IRS, ruling “fantasy performers” to be employees. The Second Circuit reversed.

This New York club operated fantasy booths, pornographic movies, and live stage shows. Customers in fantasy booths communicated with performers via telephone. When the customer deposited a coin, the telephone was activated and the performer became visible.

At the end of each shift, performers retained their tips, but transferred the coins to the company. Performers signed a lease authorizing the company to withhold 40 percent of the coins as a security deposit to reserve a booth. Interestingly, the club even offered free legal services to dancers charged with criminal violations for their work!

The club treated the performers as tenants, not employees, but the IRS disagreed. In court, both sides moved for summary judgment on whether an industry standard shielded the club. The district court found no long-standing industry practice for strip clubs, so declined to grant relief. The Second Circuit disagreed, ruling that if a “significant segment” of the industry treated the dancers as independent, that was enough.<sup>12</sup>

Similarly, in *Deja Vu-Lynnwood, Inc. v. United States*,<sup>13</sup> the club also treated dancers as tenants. The IRS ruled they were employees, so the matter went to district court. After the IRS conceded its case the club moved for attorney fees. The court denied them, so the club appealed. The Ninth Circuit reversed and awarded the fees.

#### F. Last Dance

Some have argued that good social policy should single out the adult entertainment industry for tough tax treatment.<sup>14</sup> Whether or not you agree, it is hard to deny the track record of the adult entertainment industry. On the whole, it has done a good job of manipulating the

<sup>7</sup>For examples, see *Taylor Blvd. Theatre, Inc. v. United States*, 1998 U.S. Dist. LEXIS 9355 (W.D. Ky., May 13, 1998), *Doc 98-21923*, 98 TNT 131-8; and *Deja Vu Entertainment Enterprises of Minnesota, Inc. v. United States*, 1 F. Supp.2d 964 (D. Minn. Feb. 17, 1998), *Doc 98-21922*, 98 TNT 131-7.

<sup>8</sup>See *JJR, Inc. v. United States*, 950 F. Supp. 1037 (W.D. Wash. 1997), *Doc 97-17097*, 97 TNT 112-14, *aff’d without opinion*, 156 F.3d 1237 (9th Cir. 1998), *Doc 98-26187*, 98 TNT 166-6.

<sup>9</sup>934 F. Supp. 1204 (W.D. Wash. 1996), *Doc 96-23210*, 96 TNT 162-63, *aff’d in part, remanded in part*, 151 F.3d 962 (9th Cir. 1998), *Doc 98-25330*, 98 TNT 154-7, *fees proceeding at* 1999 U.S. Dist. LEXIS 8187, (W.D. Wash. 1999), *Doc 1999-19831*, 1999 TNT 121-14.

<sup>10</sup>For another case involving the rental model in which a club was held not liable for employment taxes on its nude dancers, see *Deja Vu Entertainment Enterprises of Minnesota, Inc. v. United States*.

<sup>11</sup>1916 F. Supp. 349 (S.D.N.Y. 1996), *Doc 97-1506*, 97 TNT 11-14, *rev’d*, 181 F.3d 272 (2d Cir. 1999), *Doc 1999-21668*, 1999 TNT 120-16.

<sup>12</sup>*Id.*

<sup>13</sup>2001 U.S. App. LEXIS 23545 (9th Cir., Oct. 26, 2001), *Doc 2001-28992*, 2001 TNT 225-9.

<sup>14</sup>See Jay Soled, “Nude Dancing: A Guide to Industrywide Noncompliance,” *Tax Notes*, Sept. 21, 1998, p. 1509, *Doc 98-28550*, or 98 TNT 182-98.

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web of factors that differentiate employees from independent contractors. Many other industries are not so lucky.

Indeed, if King Arthur's case is any indication, the adult entertainment industry may have more to fear from direct suits by workers themselves than they do from the IRS. In fact, that may well be true about *most* industries. Suits claiming employee status have been brought by "independent contractors" who sell life insurance, deliver packages, pick produce, or haul freight. Those suits have involved people who write software code, workers who ferry passengers, deliver newspapers, or perform medical procedures. The list goes on.<sup>15</sup>

It is clear that worker status suits are not going away anytime soon. Given the huge dollars involved, it's no

wonder that taxing agencies, insurance companies, third parties — and the workers themselves — are evaluating their respective rights and liabilities. These lawsuits are not merely about employment taxes, although taxes can certainly be one aspect.

The moral, if there is one, relates to clarity and control. If you want to regulate every aspect of what your workers do, you may need to bite the bullet and treat the workers as employees. Conversely, if you want to treat workers as independent contractors, you must be prepared to give them some, well, independence.

Yet like most moral themes, there are many nuances and details to be addressed, and infinite judgment required. It can sometimes turn into a grail-like quest. Patience and stick-to-it-iveness are important.

On that note, if your business uses independent contractors, and many businesses do — some quite legitimately and others not so much — it may be time to go to the mattresses.

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<sup>15</sup>For a collection of cases, see Wood, *supra* note 2, at para. 4.05.

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