



That Independent Contractor Agreement Might Be Worthless

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Nothing can provide a better sense of security in one's business dealings than getting it in writing. Promises and proposals are wonderful, but it's once a document is in hand, in black and white, with a signature at the bottom, that people truly feel safe.

But what if I were to tell you that there's one type of agreement being used by many companies that may be utterly worthless? Any company that does business with an independent contractor and has that relationship memorialized in writing could be in for a surprise. A recent decision from the Oregon Court of Appeals highlights the fact that independent contractors may actually be employees, regardless of any written document that says contrary.

When a wealthy man named Alan James died in 2005, his estate hired James' former bookkeeper to help attend to the various matters related to the administration of his estate and the numerous trusts he had created. It was a large estate worth well over \$110 million - James had been a founding shareholder of The Greenbrier Cos., a manufacturing corporation based in Lake Oswego. The ex-bookkeeper, Ms. Gabaldon, then performed day-to-day bookkeeping tasks for the next several years as an employee of the estate, wrapping up all necessary financial affairs.

In 2009, once the necessary work had been completed and only part-time bookkeeping work remained, the estate asked Gabaldon to sign an independent contractor agreement to continue her work in a part-time role working out of her home. By all accounts it was a top-notch agreement drafted by the best attorneys that money could buy. This was not a form agreement pulled off the Internet or purchased at Office Depot; it was a rock-solid, true-to-form, first-rate agreement with every "i" dotted and every "t" crossed.

The agreement specifically stated that the estate did not have the right to direct or control the means or manner in which Gabaldon provided the bookkeeping services, just that she would do so; it also noted that she would be solely responsible for all taxes and fees associated with the performance of her work. These are the critical factors one would expect to see in an independent contractor agreement, factors that should seemingly provide comfort in defining the working relationship as contractor-company, not employee-employer.

A few years passed, and the Oregon Employment Department got wind of this arrangement and commenced an investigation. The department disagreed with the characterization and found that

Gabaldon was an employee, meaning that the estate was immediately responsible for all previously unpaid unemployment insurance taxes. The estate decided to challenge the assessment in court. The case wound its way up to the Oregon Court of Appeals, and in August 2013, the appeals court judges ruled in favor of the Employment Department and classified Gabaldon as an employee.

This decision serves as a good reminder that one should not blindly rely on the existence of an independent contractor agreement tucked away in a file cabinet somewhere, but instead scrutinize the nature of the company's relationship with its workers to determine whether it would meet the state's test.

Sit down with legal counsel and conduct a quick spot check of critical issues to see how things shake out. Does the contractor truly have freedom from company direction and control over the means and manner of its work? Is the contractor allowed to determine the best resources to get the job done, and the best use of those resources? Does the contractor provide its own tools, equipment, labor, devices, plans, materials, licenses, property, work location, assets, etc? Is the contractor allowed to set its work schedule, work processes and procedures? Even if the company does not exercise control over the contractor, is the relationship such that the company has the right to exercise that control but just hasn't done so (yet)?

These questions and similar ones should come to mind when determining whether a company truly is working with an independent contractor or just fooling itself.

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