If Exotic Dancers Aren't Independent Contractors, Who Is?

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Texas, with its pro-business climate, has historically been a very good place for independent contractors. However, recent changes to the legal landscape across the U.S. have left many employers scratching their heads in amazement and re-examining the prerequisites of an "independent contractor," including a significant number of cases that have examined whether exotic dancers qualify as employees or independent contractors.

In February, a Georgia federal judge ruled that exotic dancers are employees under the Fair Labor Standards Act and not independent contractors on the basis that the dancers were deemed to be an integral part of the business. This new precedent, along with other recent rulings, has raised the eyebrows of many employers in Texas, who are concerned their "independent contractors" may be misclassified and determined to be "employees."

More than 7 percent of our country's total workforce is classified as independent contractors, according to the Bureau of Labor Statistics. But, a U.S. Department of Labor study found that up to 30 percent of audited firms misclassified their employees as independent contractors. This discovery fueled an investigation, and in 2011, the Internal Revenue Service and the DOL teamed up to launch a nationwide crackdown on the misclassification of employees, known as the "Misclassification Initiative."

Regulators and lawmakers in Texas are watching this issue. A study conducted by the University of Texas and the Workforce Defense Project, in January 2013, revealed that 40 percent of all construction workers in Texas were misclassified as independent contractors. In response, Texas Gov. Rick Perry signed House Bill 2015, which established penalties for those employers who misclassify employees as independent contractors on state contracts.

The close scrutiny attributed to this issue is not stopping in Austin. Cash-strapped state and city taxing authorities throughout Texas, as well as the U.S. at large, are aggressively challenging workers categorized as independent contractors in an attempt to recover what they perceive as lost revenue in the form of payroll taxes and unemployment benefits.

Even with this increased scrutiny, the concept of independent contractors as an integral part of our country's workplace is here to stay. Nevertheless, the law in this area is rapidly evolving to address the potential liabilities and/or remedies for all parties concerned. As a result, Texas employers working in industries ranging from adult entertainment to insurance have reason to take a closer

look at workers' classifications, as businesses within their fields have suffered the consequences of misclassifying workers through recent court rulings.

What Cases Should Employers Review When Classifying Workers?

Employers across the spectrum should review recent rulings while evaluating the classifications of their workers. Below are certain representative misclassification cases from the past two years, each with valuable lessons every employer should learn.

Espejo v. The Copley Press Inc.

In January 2014, a settlement was reached after several newspaper delivery workers for The San Diego Union Tribune were misclassified as independent contractors. Workers were asked to sign independent contractor agreements, however, the agreement gave the paper control over the manner and means in which the carriers performed their service. In addition to instructing the workers on how to perform services, The San Diego Union Tribune required carriers to attend company trainings.

Lessons Learned:

- Avoid levying significant control over your independent contractors.
- If you feel the need to provide extensive training to your independent contractors before allowing them to work, you should probably hire another independent contractor instead.

In re Columbia Artists Management LLC

In September 2013, an intermediate appeals court ruled that musicians on tour, who were arranged by an international talent music management company, were employees and not independent contractors. The musicians were under the direction and control of a musical director, paid a flat fee each week and were unable to perform elsewhere if it conflicted with the tour. In addition, the performers had their lodging reimbursed and were subject to drug and alcohol tests.

Lessons Learned:

- Do not pay the expenses for your independent contractors.
- Do not subject them to the same rules as your employees.

***Chelius v.* Employment Department**

In August 2013, the Oregon Court of Appeals ruled that a bookkeeper, who was hired to administer an estate, was misclassified as an independent contractor and should be an employee, despite the independent contractor agreement she signed, which allowed her to control the manner and times in which she worked.

The key here was that the woman had worked for the estate as an employee for several years and performed bookkeeping work for no other employer. When the workload lightened, the estate

performed bookkeeping work for no other employer. When the workload tightened, the estate reclassified the woman as an independent contractor, but her work duties stayed the same.

Lessons Learned:

- Employees who change their status from employees to independent contractors cannot do the exact same job duties.
- Independent contractors should be free to perform the same type of work for other companies.

Jammal v. American Family Insurance
In August 2013, a federal district court in Ohio approved a class action based on multiple workers' claims that they were misclassified as independent contractors. These workers were retained to assist as insurance agents for the company. They said they were provided office equipment and forced to follow regular office hours.

Lessons Learned:

- Independent contractors should provide their own tools and equipment to do the job.
- Employees can be directed regarding working hours; independent contractors should not be treated in the same manner.

Solis v. KGB USA Inc.
In January 2013, a text messaging and Internet-based information service company settled a worker misclassification claim with the DOL. The company hired independent contractors to quickly respond to text message research inquiries from the general public. However, their services proved to be a vital aspect of the business, which made them employees.

Lessons Learned:

- As in the Georgia ruling on exotic dancers, independent contractors do not perform tasks that are an 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.

What is the Result of Misclassifying Workers?

- Employers who misclassify workers as independent contractors can end up with substantial tax bills. Additionally, they can face penalties for failing to pay employment taxes and for failing to file required tax forms.
- Workers may encounter higher tax bills and lost benefits, if they do not know their proper status.
- After the Affordable Care Act goes into effect for small businesses with over 50 employees, those who have misclassified workers, resulting in the company showing less than 50 employees, will

face additional fines.

As a part of the DOL's aforementioned "Misclassification Initiative," 300 new enforcement officers joined the agency. Their efforts have resulted in several employers paying hundreds of thousands, and in certain circumstances, even millions of dollars in taxes and penalties.

In light of such scrutiny from both the federal and state governments, employers should carefully assess how employees are classified and ensure that any individuals believed to be independent contractors are, in fact, properly classified.

It is far better to internally uncover and proactively address misclassification issues, rather than to learn about them for the first time in a government audit or lawsuit. Based on the technical nature of assessing whether employees are properly classified, as well as evaluating the potential for significant liability relating thereto, it is a good idea to seek the advice of knowledgeable employment counsel.

Do not be caught off-guard, as many employers — across multiple industries — have been, and find out too late that your "independent contractors" are, in fact, considered employees in the eyes of the DOL.

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