

Consider economic realities, delivery speed

Independent contractor vs. employee; Faster way to send affidavits

This month, publishers should consider carefully two issues in their day-to-day operations relating to their employees and relating to how legal notice affidavits are being delivered to your advertisers.

Recently, the U.S. Department of Labor issued an interpretative Guidance Memo that has possibly changed the rules for how the government is going to analyze employers' position in regard to independent contractors. If you are using independent contractors in your operation, you need to consider this closely.

The new memo begins with the premise that a worker is an employee when the worker is "economically dependant" on the employer if the worker is not in business for him or herself. That decision focuses on what is called the application of the "economic realities" factors. It is a case-by-case determination, making it hard to give any general rules, but the goal is to decide if the workers really are in business on their own.

The "economic realities" tests look at a) whether the work is an integral part of the employer's business; b) the opportunity for the worker to make personal profit or loss based on the worker's managerial skills; c) the investment of the worker compared to the employer; d) whether the work requires special skills and initiative; e) the permanence of the relationship; and f) the degree of control exercised/retained by the employer.

Each of these are given equal weight, but it is clear that the Department is going to put the weight of its decision on whether the worker is economically independent of the employer. Having a worker employed at home, or having a worker set their own hours, or even the fact that the worker has to provide some of their



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own tools to do the job will not alone demonstrate that the worker is independent of the employer. Those who work at home are deemed to have control over their hours and even their equipment; but still, for purposes of the Department, they are not independent contractors. Having specialized skills does not necessarily support that one is an independent contractor.

Furthermore, the Department says that a relationship between worker and employer that is indefinite indicates an "employee" relationship, whereas a "contractor" relationship would tend to be project by project.

Here, however, it is important for you to realize that the newspaper industry has an exemption under Section 13(d) of the Fair Labor Standard Act for carriers who deliver newspapers. So, no change is expected in terms of their status, only on other independent contracts a newspaper might employ.

The conclusion of most educated observers is that the Department's position is strongly going to be that anyone working for an employer

is likely an employee, unless that worker clearly has a separate business operation of their own. If the worker is clearly economically dependant on the employer for their income, the factors are going to support that they are an employee and not an independent contractor.

Secondly, it is clear that the U.S. Postal Service is not the fastest means of delivering your Publisher's Affidavits to your legal notice customers anymore. With Missouri's courts going to e-filing, you now have the ability to give your advertiser immediate access to the affidavit by faxing it to them or scanning and emailing it to them.

I encourage you to implement this change immediately in your advertising operations. You still need to mail them what lawyers call a "wet ink" copy of the document for their files, but having a scanned copy is going to be acceptable for their purposes.

And, I assume I don't need to remind you that you should confirm that the notices you swear ran did actually run on the dates you say, and also please be sure that your advertiser got a rate card at the start of the process which advises them that

your liability for mistakes in your advertising is limited to the cost of the ad.

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