



BY ED TOBIN JR., ESQ.

Maynard, O'Connor, Smith & Catalinotto, LLP
6 Tower Place • Albany, NY 12203 • 518 465-3553 • tobin@moscllp.com

Hired Help or Hired Liability?



ties, not to mention liability exposure in a civil arena. Traditionally the latter came from third parties who were injured by the worker. For example, you hired a delivery driver and he or she had an automobile accident injuring a third person. If the driver was correctly set up as an independent contractor, the third person could have no claim against you as the business owner. More recently, civil litigation has taken the form of actions by workers seeking to be classified as employees rather than independent contractors and thus securing the benefits (pension, medical, etc.) of employees.

How you label the worker in a contract has little to do with what the IRS or a court would determine the relationship to be. While each case turns on its own facts, if you retain the right to control the work, furnish the tools or materials to do the work, describe or designate the method by which the work is done, you are setting yourself up for that person to be deemed your employee. Ask yourself if you are exercising the type of control you would typically exercise upon a normal employee rather than a worker doing a job for a fixed price who typically works for others as well as you.

I had a case not that long ago where a company hired a delivery person, labeled him an independent contractor in the contract, but designated the route, the delivery schedule, furnished all the tools and equipment, was involved directly in all the monies for the delivered product and was involved in incentive programs for the delivery person. The delivery person was ultimately held to be an employee. If you use installers labeled as independent contractors but provide them with all the parts, equipment, make all of the arrangements, conduct all customer communications and all the money goes through you, with the installers working pretty much exclusively for you and pursuant to your instructions, you will probably be deemed to be utilizing these persons as your employees. The “big box” home improvement stores typically run into

this problem. Simply stated, the more control you exert over the endeavor, the more likely you are not utilizing an independent contractor.

In contracting, set up the relationship so that the independent contractor is paying their own expenses and can make their own profit or loss, or has to make a significant investment in the endeavor. Define the relationship to third persons to avoid the legal argument of apparent authority. Pay the person a flat fee with the independent contractor providing all the equipment, supplies, etc. Also in your contract, designate the relationship: that the contractor is to provide his or her own insurances and will not be receiving any kind of employment benefits and has no expectations thereto. This last point is significant. It defines the relationship so as not to create any expectations of employment status and has been found to be the linchpin uncoupling claims against an employer by “employee wannabees.”

Finally, if the relationship is set up such that the person you hire is truly an independent contractor, there are still avenues of exposure. There is always going to be responsibility for work that is deemed inherently dangerous or creates a nuisance in and of itself, where there is a nondelegable duty such as under the New York State Labor Law, where the work contracted turns out to be illegal or wrongful in some way or where you hire an incompetent contractor. I recently had a case where my business owner hired an electrician who, as we came to learn later, had a habit of causing fires on his projects through his own incompetence. A similar fire occurred in my case and the claims started pouring in against my business owner under the theory that he had hired an incompetent independent contractor. As such, you need to know who you are dealing with and just as importantly, securing verifications that they have all necessary insurances, better yet, putting you on their insurance as an additional insured.

As a business owner, the needs of your business often require hiring outside persons to do certain aspects of your business. More typical examples are hiring delivery persons or installers. Perhaps you are hiring someone to do some upgrades to your facilities. If you can outsource a particular aspect of your business, you can eliminate the burdens of withholding federal, state and sometimes even local taxes, paying workers' compensation and employee benefits as well as limit exposure for the negligence of those workers since these workers are classified as “independent contractors”. Taking advantage of the cost savings and liability protection, business owners often draft contractual relationships with these workers, labeling them independent contractors but, in practice, treat them more like employees as far as the direction and control that is wielded from above.

Perceptions of abusive practices have been the recent subject of governmental attention. In September of 2007, New York established a joint task force to address worker misclassification. In the same year, Senator, new President-Elect, Barack Obama, along with others, including Massachusetts Senator Ted Kennedy, introduced the Independent Contractor Proper Classification Act of 2007, proposing among other things, increased powers to the IRS to regulate proper classification of a worker as an independent contractor. It is anticipated that, as President, Barack Obama will make further inroads in this regard. Incorrect classification can cost you tax liens and penal-