



In this issue:

- **Private Sector Employees Continue to Say No to Unions**
- **“Independent Contractors” - An Overview**

Private Sector Employees Continue to Say No to Unions

By: Bayard Harris

Recent statistics compiled by The Bureau of National Affairs confirm that employees in the private sector continue to find unions either unneeded or unwanted. Since its peak in 1955, organized labor has been in decline as the percentage of American workers joining unions continues to drop.

In the private sector in 2009, union employees represented only 7.2% of the workforce, down from 7.6% in 2008. These percentages are based on the loss of 771,000 union jobs. Many unions do not even have 771,000 members.

There are many reasons for these declining numbers over many years, but labor’s answer is new legislation to abolish union certification by secret ballot election. The (misnamed) Employee Free Choice Act (“EFCA”) may become a focus issue again when the current debate

over health care is resolved.

It is regrettable that the unions have concluded that legislative “sleight-of-hand” is preferable to internal reform and correction of their long-standing losses through improvements in their conduct, relevance, and strategies. Democracy depends on secret ballots as a true measure of free choice.

Employers would be wise to brace for re-invigorated organizing attempts regardless of the fate of the EFCA. We have provided extensive union-free training over the years to numerous employers in the region, and we would be happy to assist your organization in the development of appropriate counter-measures to the latest organizing tactics.

“Independent Contractors” - An Overview

By: Thomas M. Winn, III

A person (or business) who agrees to provide services or products for another and who is not subject to the other’s control concerning the manner and means of performing the services. Unlike employees, independent contractors retain control over their performance of the work; the company paying the independent contractor controls only the outcome--the product or service.

Various federal agencies (e.g., DOL, ICE, EEOC) are redoubling their efforts to unmask employees who are working under the guise of “independent contractor” relationships. In particular, these agencies are pursuing claims and imposing penalties against employers that are circumventing their legal obligations by mischaracterizing

their relationships with their workers. The distinction between “employee” and “independent contractor” is most relevant in the employee benefit, wage-hour, immigration, and tax arenas. The key to avoiding liability is understanding the tests for determining whether workers qualify as

(Continued on page 2)

(Continued from page 1)

“employees” or “independent contractors.”

I. General Definition

There are a number of factors to consider in determining whether a worker is an independent contractor or an employee, the most important of which is the degree of control exercised over the worker. If the company has the right to control the worker, not only as to the results but also as to the manner and methods by which the work is performed, the worker most likely will be deemed an employee. An employer should reflect upon whether it has the right to control the hours of work, the number and the frequency of breaks, how the worker performs the work, and the type of equipment used in connection with the work. The absence of such control would support a finding that the workers are independent contractors and not employees.

Another important factor is whether the worker carries on an independent business or whether he regularly or exclusively works for the company. For this purpose, consider whether the worker advertises or generally offers his services to others; whether or not he uses a separate business name; whether he is listed in any business capacity in telephone or other directories; whether he maintains a separate place of business; whether he has appropriate licenses and insurance for business activities; and whether he supplies his own tools or equipment.

Another important factor is the duration of the relationship between the company and the worker. The relationship of an independent contractor generally contemplates the completion of a work project within a specified period of time. On the other hand, an employment relationship generally contemplates a continuous rendering of services for an indefinite or extended period of time. Also, an independent contractor typically is paid a pre-established amount or according to an agreed-upon formula for a given job, as opposed to an employee who ordinarily is paid on an hourly rate, salary, piece-work or commission basis.

Pay attention to these factors to ensure the workers are properly designated. Carefully evaluate eligibility criteria for employee benefit plans and make sure they supply a legal basis for excluding independent contractors, based on the realities of the working relationship, not merely the label of “independent contractor.” Consider using a formal agreement that contains appropriate waivers and definitions. While not controlling per se, they can support your position.

II. Bullet-Point List of Factors to Consider

Various courts and agencies cite the following factors as significant in establishing an independent contractor relationship:

- *Whether the worker is established in an independent business offering services to the public generally?*
- *Whether the worker’s business is marked by such indicia of independence as media advertising, commercial telephone listing, business cards, business stationery, carrying business insurance, possessing appropriate licenses, maintaining an independent business establishment?*
- *Whether the worker has a significant investment in facilities?*
- *Whether the worker has assumed the risk for profit or loss in providing services?*
- *Whether the worker is free to provide services concurrently for other businesses?*

On the other hand, the following factors have been found significant to establishing the existence of an employer/employee relationship:

- *How much control does the employer exercise over the employee?*
- *Whether there are restrictive provisions in the contract between the employer and worker that require the work to be satisfactory and detailing how the work is to be accomplished?*
- *Whether the employer has control over the business of the worker, even though the employer does not control the particular circumstances of the work?*
- *Whether the contract is for an indefinite time or for a relatively long period?*
- *Whether the employer may discharge agents of the worker?*
- *Whether the worker is required to work “full-time?”*

(Continued on page 3)

(Continued from page 2)

- Whether the hours of work are controlled by the employer?
- Whether the worker is required to attend mandatory meetings?
- Whether the employer may cancel the contract at its discretion, and on how much notice?
- Whether the worker must obtain permission to be absent from work?
- Whether the work is the same as or similar to that done by other employees?
- Is the worker listed on the payroll with the appropriate tax deductions?
- Is the worker directly supervised by the employer?
- Does the employer provide the facilities, equipment, tools, or supplies for the work?
- Who establishes the rate of pay for the services performed?
- Is the worker paid by the hour or by the job?
- Does the employer reimburse the worker's business or travel expenses?
- Does the employer provide the worker with fringe benefits?
- Does the employer provide the worker with training and continuing education?
- Are the worker's services an integral part of the employer's ongoing business?
- Are the worker's services part of an ongoing aspect of the employer's business?
- Does the employer establish limits within which the worker must operate, or establish territorial, monetary or time limits on the work?
- Must employees of the worker be approved by the employer?
- Does the employer keep the books and prepare the payroll for the worker?
- Is the worker assigned to a particular territory without freedom of movement?
- Does the worker have an independent economic or other interest in the work?
- How do the respective tax returns of the parties list the remuneration paid?

Not all of the factors listed above are used by the courts in all circumstances, nor is each of the factors given the same weight. Courts nearly all agree, however, that the single most important factor is the quantum of control exercised by the employer. If you have any questions about the appropriate status of, or your legal obligations to, your workers feel free to contact us.

Labor & Employment Group:

THOMAS R. BAGBY, Chair
540.983.7766
bagby@woodsrogers.com

VICTOR O. CARDWELL
540.983.7529
cardwell@woodsrogers.com

AGNIS C. CHAKRAVORTY
540.983.7727
chakravorty@woodsrogers.com

ELIZABETH HOPE COTHRAN
540.983.7525
hcothran@woodsrogers.com

BAYARD HARRIS
540.983.7717
bharris@woodsrogers.com

RJ LACKEY
434.797.8202
rjlackey@woodsrogers.com

JOSHUA F.P. LONG
540.983.7725
jlong@woodsrogers.com

ANTHONY H. MONIUDIS
434.797.8202
moniudis@woodsrogers.com

WILLIAM B. POFF
540.983.7649
poff@woodsrogers.com

DANIEL C. SUMMERLIN
540.983.7546
summerlin@woodsrogers.com

JOSHUA R. TREECE
540.983.7730
jtreece@woodsrogers.com

THOMAS M. WINN, III
540.983.7702
winn@woodsrogers.com

DUDLEY F. WOODY
540.983.7683
woody@woodsrogers.com