

Freelancers vs. Employees: Watching Out For Hidden Liabilities
By Donald R. Simon, Esq.

Freelancers are common place in the production business. Their use can be a cost effective way to pull a production together. However under the law, an individual's status as either an employee or freelancer can have huge implications on how liabilities are shifted. If a hired talent is unwittingly classified as an employee, the employer may be liable for damages and injuries caused by that individual as well as have liability for that person's income and social security taxes!

Determining whether someone is a truly an employee or just a freelancer is not always easy. It is more complicated than simply calling someone an "independent contractor" and giving them a 1099 at the end of the year. The process requires an assessment of factors. No single factor decisively defines whether an individual is an employee or an independent contractor. The following are some general questions to ask when determining employment status.

Answering "YES" to the following questions tends to establish status as an employee:

1. Do you have the right to make the worker comply with your instructions on when, where, and how he or she must work?
2. Do you train the worker (on your premises or the worker's) by requiring him or her to work with someone experienced?
3. Do you require the worker to attend meetings?
4. Are the worker's duties an integral part of your operation? Is the worker's function necessary to your business?
5. Do you require the worker to provide the services personally, or can he or she delegate them to someone else?
6. Do you hire, fire, and pay the worker's assistants?
7. Is there a continuing relationship between the worker and yourself? Are services performed frequently (although irregularly)?
8. Do you set hours during which the individual must work?
9. Must the worker devote all of his or her time to your job?
10. Must the worker work on your premises, especially if the work could be performed elsewhere?
11. Do you have the right to set the order in which services are performed, whether or not you exercise that right?

12. Do you require workers to give you written or oral reports?
13. Do you pay the person by the hour, week or month? (Contractors tend to be paid by the job or on straight commission).
14. Does the worker require prior permission for absence from the job?
15. Do you pay the worker's travel or business expenses?
16. Do you provide the worker with tools or materials?
17. Do you have the right to fire the worker?
18. Can the worker quit at any time?

Answering “YES” to the following questions tends to establish status as an independent contractor:

1. Does the worker invest in facilities, such as an office, that are not typically maintained by employees?
2. Can the worker incur a profit or loss as a result of his or her work (in addition to the profit of payment for the work)? A contractor should bear economic risk due to investments or liabilities other than the risk that he or she will not be paid.
3. Does the worker work for more than one business at a time? (Note, however, that the IRS says that a worker could be an employee of numerous service recipients.)
4. Does the worker offer services to others on a regular basis?
5. Does the worker advertise his services in electronic and/or print media?
6. Does the worker carry independent insurance?
7. Does the worker purchase and use his own business cards, business stationary, billheads, etc., that is different from yours?

The above questions are by no means exhaustive. Each determination is fact specific and should be taken on a case by case basis.

One related issue: copyright ownership. Whether a person is a freelancer or employee has enormous implications on ownership of the resulting creative work. If a production company is working with independent contractors to supply any portion of creative material, written agreements must be in place to document the company's rights in that material. Otherwise, the copyright laws assume that the copyright in any such work is owned by the actual creator, that is, the independent contractor and *not* the producer. As such, when engaging the services of

freelance professionals, producers must insist upon a written agreement confirming that a “work-for-hire” arrangement or assignment of copyright has been obtained.

Donald R. Simon is an intellectual property attorney concentrating in entertainment, copyright, trademark, and advertising law issues. Send questions or comments to dsimon@entertainmentlawchicago.com. This periodic column is provided as a source of information and is not to be construed as legal advice or opinion, or to form an attorney-client relationship. For legal advice, please consult an attorney.