



AN ICON OF TRUTH AND JUSTICE.
BUT WHEN IT COMES DOWN TO BUSINESS,
IT IS AGGRESSIVE AND RELENTLESS.

**Independent Contractor Status –
The Goal Can Be Achieved**

April 28, 2016

L. Michael Zinser



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L. Michael Zinser

Personal Motto: "Never, never, never, never give up."





Independent Contractor Status:
The Goal Can Be Achieved!



Independent Contractor Status:

Sources of Scrutiny

The following laws will dramatically impact your newspaper, depending upon whether your newspaper Contractors are employees or independent contractors:

- **National Labor Relations Act**
- **State Unemployment Laws**
- **Workers Compensation**
- **Fair Labor Standards Act**
- **Tort Laws**
- **Antitrust Laws**
- **State and Federal Tax Laws**



Independent Contractor Status:

Sources of Scrutiny

The following laws will dramatically impact your newspaper, depending upon whether your newspaper Contractors are employees or independent contractors:

- **Immigration Reform Act**
- **Title VII of the Civil Rights Act of 1964**
- **The Age Discrimination in Employment Act**
- **1991 Civil Rights Act**
- **Americans with Disabilities Act**
- **Family and Medical Leave Act of 1993**
- **Affordable Care Act (Obamacare)**



Independent Contractor Status:

The Contractual Relationship

- The relationship between the Publishing Company and its Contractors is a contractual relationship.
- Your written contract is your first line of defense in a lawsuit that puts at issue the independence of your Contractors and/or distributors.
- This written Agreement must be drafted to preserve independent contractor status. Your day-to-day contact with the Contractors should be consistent with the written Agreement.



Newspaper Contractors and Independent Contractor Status

- Placing the label “independent contractor” on a Contractor is not controlling.
- Whether a Contractor is an employee or an independent contractor depends upon all of the factors of the relationship between the Company and the Contractor.
- There are hundreds of reported newspaper cases involving this key issue.



Factors of Independent Contractor Status

- **Contractor has the right to solicit and deliver to customers outside the strict boundaries of his or her negotiated territory.**
- **Contractor has the right to negotiate route boundaries.**
- **Contractor has the ability to charge a subscriber more than the Company's suggested retail price.**
- **Contractor has the right to negotiate the wholesale rate charged Contractor, or the right to negotiate contract fees paid to Contractor.**



Factors of Independent Contractor Status

- **Contractors, by contract, are financially responsible for any damages they cause while delivering newspapers.**
- **Contractor's contract compensation fluctuates up and down, depending on the number of newspapers delivered.**
- **Contractor invests time and money to obtain new subscribers.**
- **Contractor has the right to cancel a subscriber for nonpayment of the bill.**



Factors of Independent Contractor Status

- **Contractor has the right to choose not to place newspapers in a tube.**
- **Contractor has the right to purchase polybags (or any supplies) from any source.**
- **Contractor has the right to decide if and when polybags will be used.**



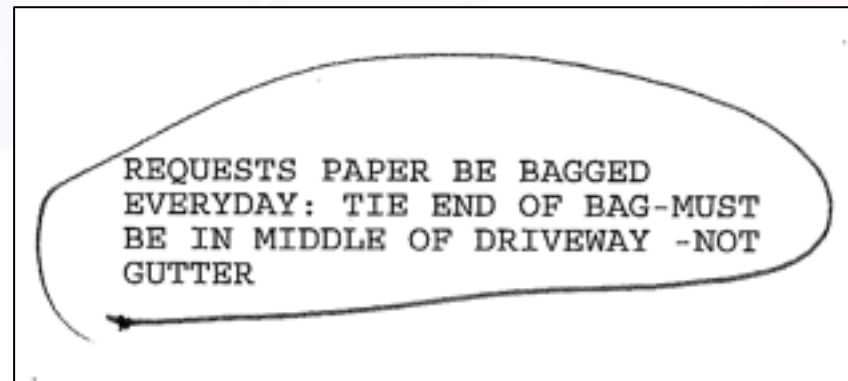
Factors of Independent Contractor Status

DUCT	TRANSACTION TYPE	DELIVERY SCHEDULE	BILLING METHOD	COUN
	Stop	YYYYYYY	Office Pay	
***** REMINDER *****				
e bag the papers everyday. thanks				

Contractors control the manner, means, method, and mode of delivery.



Factors of Independent Contractor Status



Contractors control the manner, means, method, and mode of delivery.



Factors of Independent Contractor Status

- **Contractor bears the risk of lost or stolen newspapers.**
- **Contractor bears the risk of loss for unsold newspapers.**
- **Contractor has the obligation to furnish a bond to secure performance.**
- **Contractor has the right to determine when and how subscribers will be billed.**



Factors of Independent Contractor Status

- **Contractor has the right to collect in advance from subscribers.**
- **Contractor has the right to choose a substitute.**
- **Contractor has the right to decide what to pay his or her chosen substitute.**
- **Contractor has the right to deliver other publications.**



Factors of Independent Contractor Status

- **Contractor has the right to have a voice in the selection of bundle drop points.**
- **Contractor has the flexibility in meeting delivery deadlines.**
- **Contractor has the right to set his or her own working hours.**
- **Contractor has the obligation to pay Company in the event Company delivers a missed paper; is Contractor charged a fee | for redelivery or any other types of complaints?**



Factors of Independent Contractor Status

- Contractor has the obligation to handle subscriber complaints.

***** COMPLAINT *****

at Code: BC Incident Date: 01/14/2009

PLACEMENT COMPLAINT PLEASE
DELIVER PPRS DAILY TO FRONT
DOOR AS PREVIOUSLY AGREED TO
AVOID THEFT ALSO CUST NOT WELL

To be checked

Various request
for paper to be at
front door. Please comply.

Bundle tops: what NOT to do!



Factors of Independent Contractor Status

- **There is a written contract indicating an independent contractor relationship.**
- **There is a requirement that the Company give at least 30 days advance written notice in the “without cause” termination context.**
- **Contractor has the obligation to purchase all insurance; this includes Contractor accident insurance.**
- **Company furnishes to Contractor no employee-like benefits (e.g. health insurance, vacation, et al.).**



Factors of Independent Contractor Status

- **Contractor has the right to choose type of vehicle used for delivery.**
- **Contractor has the obligation to purchase his or her vehicle and pay all expenses.**
- **Contractor has the right to employ helpers.**
- **Contractor has the obligation to file all state, federal, and local tax returns and to cover Contractor's employees, if any, for Unemployment tax and Workers' Compensation purposes.**
- **Company files IRS Form 1099 for Contractors.**



Factors of Independent Contractor Status

- **Contractor files a Schedule C return as a self-employed business person.**
- **Company withholds no taxes of any kind from monies due Contractor under the contract.**
- **Contractor has the right to determine sequence of route delivery; route lists, audio tapes, computerized devices (software).**
- **There is a stated term in the Contractor's contract.**
- **Contractor purchases a business license.**



Factors of Independent Contractor Status

- **There is language in a Contractor recruitment ad that indicates independent contractor status.**
- **There is a contract provision that prohibits Contractor from using the logo or trademark of the Company.**
- **Contractors receive no “training” on “how to” deliver the newspapers.**
- **There is a contract provision requiring the Contractor to indemnify the Company.**



Factors of Independent Contractor Status

- **Contractors are unsupervised or unmonitored while they deliver newspapers.**
- **Contractors perform all of their contract services away from the premises of the Company; there is no advantage to allow the loading dock or distribution center to be a “social club” | for Contractors.**
- **There is a contract provision indemnifying the Company from the Contractor’ s telemarketing efforts.**
- **Contractor advertises/markets his or her services in some way.**



Factors of Independent Contractor Status

Courts and agencies weigh the factors and decide the status of the Contractor. No one factor is determinative.

A newspaper need not be perfect to prove independent contractor status. In those cases where the Company is successful in proving independent contractor status, some of the factors always evidence employment. The goal is proving that the contractor has the FREEDOM and the right to control the manner, means, method, and mode of delivery.



The key is achieving a defensible mix of factors enabling you to prove independent contractor status.



Independent Contractor Status:

State Agency Connections

State departments of unemployment have gotten into the act. They also are aggressively taking the position that Contractors are employees for obvious revenue purposes.

Close, serious scrutiny of Contractor unemployment claims is crucial. Do not treat them routinely.

Some of the state agencies have a questionnaire; do not feel compelled to complete it. Rather, draft a persuasive position paper. Again, proceed cautiously and with advice of counsel.



Independent Contractor Status: *Contract Audit*

Your Independent Contractor Agreement should be reviewed to determine its legal viability in light of these recent developments at state unemployment agencies.

Preventive medicine is the best medicine!



Independent Contractor Status:

Achieving the Goal

Independent contractor status – the goal can be achieved!
If you truly desire to have independent contractor newspaper distributions, you can have them. The Company must first make a management decision that this goal is important. You must be willing to fight – i.e. litigate – to preserve the right.

Those who are willing to tenaciously fight for independent contractor status will achieve it.



Independent Contractor Status:

Litigation

The courthouse is where we “close the deal.” If we have done our marketing homework, this is where the ultimate sale is made.

Do not be awed by the lawyers. Remember, you know more about your operation than anyone else. Knowledge of and belief in the product are keys to successful selling.

If you know and believe in the independent contractor concept, you can sell it to the judge! You can be more persuasive than the other side.



Independent Contractor Status:

Litigation

The following tactics are very helpful:

- **Contractor Witnesses —** We want two or three contractors to testify in support of our case. Pick those contractors who are regarded as “pains in the neck.” They will “look, feel and smell like” independent contractors.
- **Preparation —** All witnesses should be thoroughly prepared to give testimony. Make sure every positive piece of evidence finds its way into the record.



Independent Contractor Status:

Litigation

In many cases, you will be forced to go to an appellate level to get justice. You can often expect a jury or administrative agency to make a mistake. Be sure to make a good record for appeal. The appellate courts are most likely to correctly apply the law to the facts.



Independent Contractor Status:

Decision Time

Litigation is expensive. You must ask how much you are willing to spend to preserve the independent contractor.

Analyze the total cost of employee status. If your Contractors are employees, many state and federal laws impact you in many ways.

You may decide it is worth a lot to keep the independent contractor system intact.



The IRS Direct Seller Amendment

- **Direct Seller Amendment**
- **Recent IRS Attempts at end run**
- **Three points of compliance**



Independent Contractor Status Preserved

The Direct Seller Amendment is intended to apply to newspaper distributors and Contractors whether or not they hire others to assist in the delivery of newspapers.

The “direct seller” exemption applies to newspaper distributors and Contractors operating under either a buy-sell distribution system (i.e. where the newspaper distributors or Contractors purchase the newspapers from the publisher) or an “agency” distribution system.



Independent Contractor Status Preserved

Thus, newspaper distributors and Contractors operating under an agency distribution system who are paid based on the number of papers delivered and have an appropriate written Agreement qualify as direct sellers.

This new law applies to services performed after December 31, 1995.



Independent Contractor Status Preserved

Three points of compliance:

- (1) Substantially all the remuneration for the performance of the services is directly related to sales or other output rather than to the number of hours worked, *and*;**
- (2) The services are performed pursuant to a written contract, *and*;**
- (3) The written contract provides that the person will not be treated as an employee for federal tax purposes.**





Preventative Legal Medicine



Contractor Recruitment

- **Draft independent contractor-friendly ad.**
- **“Business Opportunity” ad.**
- **Avoid terms such as “part-time job” and phrases such as, “We are an equal opportunity employer.”**



Contractor Recruitment

NEWSPAPER CARRIER RECRUITMENT AD
FOR PLACEMENT IN A NEWSPAPER

BUSINESS OPPORTUNITY

*WOULD YOU LIKE TO DELIVER NEWSPAPERS
AS AN INDEPENDENT CONTRACTOR
UNDER AN AGREEMENT WITH
_____?*

Operate your own business with potential profits of _____ per month. Call _____
to make an appointment at _____.



Contractor Recruitment

BUSINESS OPPORTUNITY!

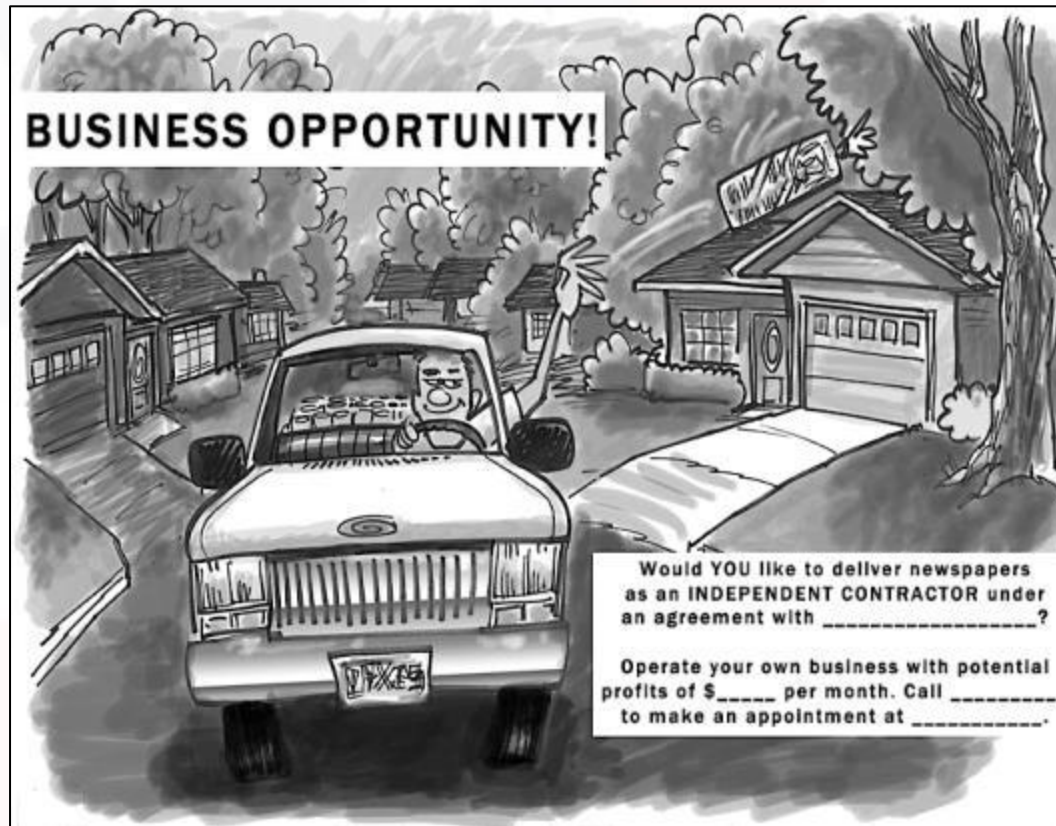


Would YOU like to deliver newspapers
as an **INDEPENDENT CONTRACTOR** under
an agreement with _____?

Operate your own business with potential
profits of \$____ per month. Call _____
to make an appointment at _____.



Contractor Recruitment



Contractor Recruitment

Elements include:

- **Application Form — Do not use the usual employment application. Design your own “Independent Contractor Information Sheet.”**
- **See handout for example.**



Contract Compensation

- **Must not be based on hours worked.**
- **In the case of circulation, compensation should be based on sales or output.**
- **The right to negotiate compensation is key.**
 - **Label the rates as negotiated.**
 - **Start with a blank slate.**
 - **Have contractor acknowledge his/her right to negotiate the rates.**



Where Are Services Performed?

- **Do not provide an office or other workspace to the contractor.**
- **Contract services should be performed off-premises.**
- **Note lack of regular contact with Newspaper Management.**
- **Do not include in meetings with employees.**



Freedom of the Contractor

- **Contractors should set their own hours of work.**
 - **Delivery deadlines are okay.**
- **Contractor's right to engage others to assist contractor – a key piece of freedom.**
 - **Again, be careful with restrictions.**
- **No group meetings.**
- **Independent contractor newspaper Contractor determines sequence of delivery.**



Employee-Type Benefits

- **No benefits provided to contractors.**
- **Contractors do not receive Employee Handbook.**
- **Contractors do not complete employment application.**
- **Contractors do not receive keys, keycards, or electronic access codes to the building.**
- **Contractors do not receive Company e-mail addresses.**



Communications Strategies

Elements of the communication plan include:

- **Training — Teach the independent contractor concept to everyone who has contact with the contractors – including District Managers, Zone Managers, and customer service clerks. These individuals create the evidence that will promote or tear down the concept**



Communications Strategies

Elements of the communication plan include:

- **Company Brochures and Employee Handbooks —** When describing the distribution system, do not pass up the opportunity to describe the independent contractor status of the individuals delivering your newspaper.
- **Written Communication —** When communicating with contractor, write a personalized letter. Do not use the “interoffice memo” you might use to communicate with your inside employees.



Communications Strategies

Elements of the communication plan include:

- **Terminology** — Remember, you do not “fire” contractors; you terminate their contracts. More than one judge has noted testimony by circulation managers claiming to “fire” contractors. The terminology markets a thought process – an intent.

Circulation management does not “manage” or “supervise” contractors. It do not “assign” routes to contractors or “discipline” them. It does not give them “instructions” on how to deliver newspapers.



Communications Strategies

Subscriber Message

TYPE	<u>INSTRUCTIONS</u>	DATE
YYYYYYY	Office Pay	01/19/2009
ACCT:	1085234 COPIES: 1	
ROUTE:	0169072	
VACATION WITH RESTART DATE		

You do not give “instructions” to contractors –
you pass on messages from subscribers.



Responding to Agency Questionnaires

- **Questionnaires typically come from the State Department of Unemployment or the Internal Revenue Service.**
- **Most often received by the Human Resources Department.**
 - **HR should involve the Department Head.**
 - **HR should also alert legal counsel.**
 - **Pay close attention to deadlines.**
- **If you have outsourced unemployment to a third party company, make sure you are notified immediately about contractor claims.**



Responding to Agency Questionnaires

- **General Advice: Do not complete the form!**
 - The questions on the form are intentionally biased and confusing.
- **Instead, write a letter that persuasively makes the case for independent contractor status.**
 - Do not rush to meet short-term deadlines; do a thorough job.





The Contracting Process



Complete IRS Form W-9

- **Contractor signs this document.**
- **Accounts Payable uses the form to set up IRS Form 1099.**
- **Contractor selects the form of business organization.**
- **Helps prove contractor is in business for him or herself.**
- **Explain to contractor that no taxes will be withheld from contract payments.**
- **Explain to contractor that he or she is responsible to pay all federal, state, and local taxes.**



Complete IRS Form W-9

- The Internal Revenue Service recognizes the completion of the IRS Form W-9 as the first step in creating an independent contractor relationship.
- See *Forms and Associated Taxes for Independent Contractors*, IRS, <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Forms-and-Associated-Taxes-for-Independent-Contractors>

Forms and Associated Taxes for Independent Contractors

Form W-9

If you've made the determination that the person you're paying is an independent contractor, the first step is to have the contractor complete [Form W-9](#) (PDF), Request for Taxpayer Identification Number and Certification. This form can be used to request the correct name and [Taxpayer Identification Number](#), or [TIN](#), of the worker. A TIN may be either a Social Security Number (SSN), or an Employer Identification Number (EIN). The [W-9](#) (PDF) should be kept in your files for four years for future reference in case of any questions from the worker or the IRS.



Sample IRS Form W-9

Form W-9 (Rev. October 2007) Department of the Treasury Internal Revenue Service	Request for Taxpayer Identification Number and Certification	Give form to the requester. Do not send to the IRS.			
Print or type See Specific Instructions on page 2.	Name (as shown on your income tax return)				
	Business name, if different from above				
	Check appropriate box: <input type="checkbox"/> Individual/Sole proprietor <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Limited liability company. Enter the tax classification (D=disregarded entity, C=corporation, P=partnership) ▶ <input type="checkbox"/> Exempt payee <input type="checkbox"/> Other (see instructions) ▶				
	Address (number, street, and apt. or suite no.)				
	City, state, and ZIP code				
	List account number(s) here (optional)				
Part I Taxpayer Identification Number (TIN)					
<p>Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see <i>How to get a TIN</i> on page 3.</p> <p>Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.</p>					
<table border="1" style="width: 100%; border-collapse: collapse;"><tr><td style="text-align: center;">Social security number</td></tr><tr><td style="text-align: center;">or</td></tr><tr><td style="text-align: center;">Employer identification number</td></tr></table>			Social security number	or	Employer identification number
Social security number					
or					
Employer identification number					
Part II Certification					
Under penalties of perjury, I certify that:					
<ol style="list-style-type: none">1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and3. I am a U.S. citizen or other U.S. person (defined below).					
<p>Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. See the instructions on page 4.</p>					
Sign Here	Signature of U.S. person ▶	Date ▶			



Review of Written Contract

- **Important for Company representative to spend time reviewing the written Agreement with the contractor.**
- **Explain up front to the individual that he/she will be an independent contractor and NOT an employee.**
- **There should be a page-by-page review that allows the contractor to ask any questions he or she may have.**
- **Have the contractor initial each page as it is reviewed; this cements the contractor's intention to be an independent contractor.**
- **It is important that the Company representative is trained to understand the written Agreement.**



Sample Contract Page

\$_____. As an independent contractor, Contractor retains the right to directly contact subscribers in writing and otherwise. Contractor has no obligation to report complaints to Company when complaints are communicated directly by the subscriber to Contractor.

3

I have read and understand this page.

Contractor's Initials



Review of Written Contract

- **Start the process with a “blank slate.”**
- **Document rate negotiations.**
- **Give contractor the option to have the contract reviewed by legal counsel.**
- **Do not be afraid of negotiations.**



Review of Written Contract

- **Be sure contractor reads and understands the English language.**
- **Explain to contractor that he or she has the right to determine the sequence of delivery.**
- **Explain to contractor that he or she will not be eligible for Workers' Compensation or Unemployment Compensation.**



The Contracting Process:

Next Steps

- **Review sample invoice with contractor.**
- **Review daily computer-generated bundle top.**
- **Obtain proof of contractor's valid driver's license and vehicle insurance information.**



Independent Contractor Contractor Accident Insurance

- **Explain the coverage to the contractor.**
- **It is important that the Company representative is trained to understand the product.**
- **Have contractor complete the enrollment card or the rejection card.**
- **If contractor purchases the insurance, give contractor a copy of the policy.**
- **Explain to contractor that he or she pays the entire premium.**



Management Contracting Checklist

The following factors should be reviewed when contracting with any independent contractor newspaper Contractor. After completing the item, the Circulation Manager and prospective contractor involved should place their initials by the numbered item:

1. The circulation management representative reviewed the entire Independent Contractors Distribution Agreement with the prospective contractor and had him or her initial each page.

2. Completion of negotiations:

- The Company's proposed rate was _____.
- The prospective independent contractor made a counter offer or counter offers of _____.



Management Contracting Checklist

- 3. The prospective independent contractor completed IRS form W-9.**
- 4. The Contractor accident insurance for independent contractors was reviewed with the prospective independent contractor.**
 - The prospective independent contractor completed the acceptance/rejection card.**
 - The prospective independent contractor was provided information explaining the coverage.**



Management Contracting Checklist

- 5. The prospective independent contractor provided proof of vehicle insurance.**
- 6. The prospective independent contractor provided a photocopy of his or her valid driver's license.**
- 7. The prospective independent contractor provided the Company with a copy of his or her most current motor vehicle report revealing his or her driving record.**



Management Contracting Checklist

- 8. After both parties signed the Independent Contractor Distribution Agreement, a photocopy of the signed document was provided to the contractor.**
- 9. The prospective independent contractor completed the Bond application.**
- 10. The circulation management representative provided a route list to the independent contractor.**
 - Audio tape**
 - Written list**



Management Contracting Checklist

11. The circulation management representative explained to the prospective independent contractor that he or she has the right to determine the sequence of route delivery.

12. The prospective contractor reads and understands the English language.

- The prospective contractor cannot read English; however, (name and address) acted as a translator.**
- The prospective contractor cannot read English; however he or she was provided a contract in _____ language, which he or she can read and understand.**



Management Contracting Checklist

13. The circulation management representative reviewed and explained a sample statement provided to contractors.

14. The circulation management reviewed and explained an example of daily messages relayed by the Company to the contractor from subscribers.

15. The circulation management representative specifically informed prospective contractor that he or she is responsible to pay federal income taxes and that no taxes will be withheld by_____.



Management Contracting Checklist

16. The circulation management representative specifically informed the prospective contractor that he or she, as an independent contractor, is not eligible to receive with Workers' Compensation benefits or Unemployment Compensation benefits.

After reviewing and initialing each item on the checklist, this form should be signed by both the contractor and a management representative of the Company.





Contract Administration Snafus



Contract Administration Snafus

- **Allowing the freelance writer or photographer to perform services for the Company before he or she actually signs a written Agreement.**
- **The written Agreement contains contract language that does not apply to the contractor.**
- **Failure to give the contractor a copy of the final contract after it is negotiated and signed.**



Contract Administration Snafus

- **Failure to require the contractor to follow the contract's termination provisions; the contractor should terminate the Agreement in writing, just as the Company would.**
- **Unfortunate and poor draftsmanship of advertising language to recruit new contractors.**
- **Failure to reflect in the written Agreement all compensation paid to the contractor.**



Contract Administration Snafus

- **Failure to start the contracting process with blanks for all the negotiable items in the Agreement.**
- **Failure to learn whether the contractor can read and write the English language.**





The NLRB's War on Independent Contractors and the NLRB's New Joint Employer Decision



Overruling *St. Joseph News Press*



- In a recent case against FedEx Home Delivery, the NLRB has ruled that FedEx drivers in Connecticut are employees.



- This Decision overrules *St. Joseph News-Press*.



“We overrule *St. Joseph News-Press* today, insofar as the decision mistakenly suggests that the Board cannot consider evidence that a putative employer has effectively imposed constraints on an individuals ability to render services as part of an independent business.”



- The new Decision diminishes the significance of **entrepreneurial opportunity** and overemphasizes factors of **perceived economic dependency**.



- **A one-factor test:**

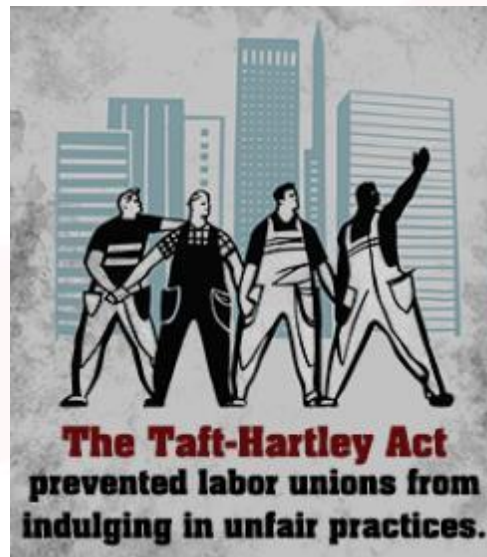
- **Disparity of bargaining power**



- Adopted the dissent of former Chairman Wilma Liebman in *St. Joseph News-Press*.
- Chairman Liebman cited European precedent.



- The new Decision is contrary to the **1947 Taft-Hartley Amendments** – the NLRB is exceeding its authority.



- The NLRB is giving no weight to economic opportunity.
- The NLRB only gives economic opportunity significance *if it is actually exercised*.



The NLRB Reversed on an Independent Contractor Case

Disagreeing with the NLRB, the Court gave significance to the fact that the individuals had the right to perform their services for competing companies.



- **Disagreeing with the NLRB, the Court stated, “The Board committed a more fundamental error by treating bargaining power as evidence that the stagehands are employees.”**
 - **Disparity of bargaining power does not create an employee relationship.**
 - **Under the common law of agency, the NLRB should have given no weight to disparity of bargaining power.**



**A Company may have to go to the
Court of Appeals to preserve
independent contractor status.**

NEVER
NEVER
NEVER
GIVE UP

Winston Churchill



Browning-Ferris
Joint Employer Decision



In a broad sweeping 3-to-2 Decision in *Browning-Ferris*, the Obama NLRB recently rewrote the decades-old test for determining who is the “Employer.” Under the previous caselaw, a Company had to exercise **direct control** over wages, hours, and working conditions to be an “Employer.” Now, under the new standard, the Company is a “Joint Employer” if it exercises “**indirect control** over working conditions, or if it reserves the authority to do so.”



The Board majority redefined and expanded the test that makes two separate, independent entities a “Joint Employer” of certain employees. In direct defiance of legislative history and Supreme Court decisions, the Board majority incorporates theories of “economic realities” and “statutory purpose” that extend the definition of “Employee” and “Employer.”





The U.S. Department of Labor's Attack on Independent Contractor Status



- On July 15, 2015, U.S. Department of Labor issued an interpretative Guidance Memo on the “misclassification of employees as independent contractors.”

- This is potentially a game changer!

- Consistent with the NLRB’s decision overruling *St. Joseph News Press*



- Part of the administration's overall war against independent contractors
- The current administration is very pro-union, and **labor unions HATE independent contractors.**
- This Guidance Memo does the bidding of labor unions everywhere.



- **The Guidance Memo tries to stretch the definition of “employee.”**
 - **Inconsistent with current caselaw.**
- **Focuses on economic dependency of the individual contractor.**
 - **Places little value on the intention of the parties.**



NEWSPAPER-SPECIFIC EXEMPTION

- **Exemption under Section 13(d) of the Fair Labor Standards Act:**
 - **If an individual is engaged in the delivery of newspapers to the consumer, he/she is exempt from the minimum wage, overtime, and child labor provisions of the FLSA.**
- **Does not apply to other types of contractors.**



**It is clear that the DOL is going to
take the position that most
individuals are employees – *not*
independent contractors.**



- ☐ Employee
- ☐ Independent Contractor





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