
Independent Contractor Reporting

By Dominic A. Santos • Wood & Porter • San Francisco

I recently participated in Lorman's 90-minute telecast seminar entitled *Independent Contractor Reporting*. Lorman targets lawyers, accountants, H.R. managers, CFOs and others, and has a wide array of seminar offerings. Like so many seminars today, this seminar was a telecast, so attendance was painless, done right from my office. The seminar was led by Kurt L.P. Lawson, a partner at Hogan & Hartson, a large Washington-based law firm. Lawson primarily represents employers in matters affecting employment taxes, pensions, health, fringe and other benefits, and is recognized as a leading attorney in this field.

Seminar participants were provided with a downloadable 30-page course outline. Tables and articles were also provided, as was a copy of the stalwart IRS publication *Independent Contractor or Employee? Training Materials*. That IRS offering was developed to provide employment tax specialists and Revenue Officer Examiners with tools to make worker classifications. Reading it gives you a sense of how they think.

The focus of this seminar was understanding how independent contractor status is determined for purposes of both state and federal law. More than this, the short seminar examined many basic advantages and disadvantages of independent contractor status for both the company and the worker. Finally, it addressed how to handle disputes over independent contractor status when they arise. And arise they do, almost inevitably.

Big Bucks

Lawson noted that independent contractor status has distinct advantages for companies and

workers, and continues to grow in popularity. That's probably an understatement. Whether you view this as a positive or negative phenomenon, it's a growing one. However, getting independent contractor status wrong (that is, facing recharacterization) can be very, very expensive.

Fortunately, some thoughtful advance planning can limit not only the number and scope of some disputes, but their severity and economic impact on a business. This seminar provides a great overview of the history and current methods of determining worker status and the factors that play a key role in that determination.

As you might expect, contract language serves as the basis for the relationship between the worker and the service recipient (note the neutral terminology). If a legal dispute arises between the worker and the company, or an IRS audit takes place, the contract will be everyone's exhibit *numero uno*. Yet, it should come as no surprise that the contract itself is not dispositive on the determination of whether a worker is an employee or independent contractor for federal tax purposes.

Clearly it is relevant in making that determination. After all, the contract can provide evidence of the parties' intent, help define the level of control (or lack thereof) the service recipient has over the worker, and outline rights that may be indicative of independent contractor status (such as the right to hire assistants or work for other companies simultaneously). Of course, beyond the contract, other rules, manuals, policies, memos and correspondence can all factor in, as can experience on the ground. The worker status question is enormously fact-intensive.

SS-8 Forms

Lawson mentioned another method for determining worker status. Either party can apply to the IRS for a determination by using IRS Form SS-8. The IRS will consider the information provided on the form, and will also contact the nonfiling party for *its* version of the facts relevant to the application. Each side gets a say.

Unlike so many submissions to the IRS these days, there is no fee for the determination, and it isn't generally too detailed (regardless of whether worker or employer submits it). Response time varies, and answers can take months.

An important consideration for filing this form is that an adverse determination is not appealable. Still, the filer can ask for reconsideration if new information arises, or can withdraw the application at any time prior to the IRS signing the determination letter. The determination is only binding on the IRS, so its relevance is limited to actions initiated by the IRS. Moreover, the IRS can only rule on the facts and information before it, so it's worth trying to

ensure that relevant facts are submitted. Don't treat SS-8 submissions as trivial. They are not.

Big Field

It is not possible to cover every nook and cranny of independent contractor versus employee controversies in a short 90 minutes. Even focusing strictly on the federal tax side would be a tall order. When you add in state tax laws, unemployment law, worker's compensation, federal and state employment law, tort law and all of the many other messy contexts in which this now fundamental (and growing) area arises, it's truly a many-headed hydra.

Still, this seminar is a great introduction to the world of independent contractor reporting, and the advantages and disadvantages of contractor versus employee status. An audio recording is also available for purchase through Lorman's Web site, and a purchase of that audio includes all course materials.

For more information about this telecast or other seminars, programs, courses and books from Lorman, visit www.lorman.com or call (866) 352-9539.