



Misclassifying hotel workers as independent contractors could lead to costly liability

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In recent months, several states, including New York, New Jersey and Connecticut, have implemented enforcement plans against employers that wrongfully misclassify workers as independent contractors rather than employees. The increased scrutiny from federal and state agencies demonstrates that hoteliers must be on alert to ensure their independent contractors are properly classified.

The issue at hand

In recent months, New York Governor Eliot Spitzer announced plans to launch an enforcement campaign against companies who misclassify workers. The Governor has proposed an aggressive campaign to seek out misclassification and recoup lost tax revenue for the State. However, lost tax revenue is not the only consequence of misclassification. Workers classified as independent contractors are not protected by most employment-related federal and state laws and are ineligible for workers compensation and unemployment benefits. New Jersey and Connecticut are also stepping up enforcement action against employers who misclassify workers.



Federal and state agencies' attacks on the independent contractor relationship focus on the amount of control that the employer has over the manner and means of the contractor's performance of his or her services. Independent contractors are skilled workers who perform services without being subject to control over the manner and means in which their services are performed. Employees, on the other hand, often lack specific skills and are instructed on how their work should be performed, including the hours, pace, place and nature of their work. Problems arise, and monetary liability attaches, when the lines between control over the manner and means of performance is blurred.

In particular, recent attacks on the misclassification of workers have focused on specific aspects of the relationship, such as (1) the contractors' time and schedule; (2) the clients with whom the contractor will be working to complete their work; and (3) the contractors' methods for performing their work. Other issues of control include whether contractors are provided training by the employer, work for one or many different companies, supply their own tools and equipment, wear uniforms, and/or have an opportunity to increase their profits or incur losses. Depending on these factors, a regulatory agency or court could conclude that misclassification has occurred, and an employer-employee relationship has been created.

What this means for hoteliers

Misclassification can lead to costly liability for hoteliers, including claims for back taxes such as federal and state payroll taxes, back benefits, and large fines from federal and state agencies. Consequently, all hotels with independent contractor relationships should carefully review their rosters of contractors and employees to ensure that they are properly classified. The standards to be applied in determining which workers are employees and which are independent contractors may vary from state to state; thus, all employers must focus on this state issue to ensure compliance with all applicable regulatory requirements. ✧

(Krupin O'Brien LLC's national practice exclusively represents employers and management, including hoteliers, in the fields of labor relations, employment law, business immigration and related litigation. Kara M. Maciel is an associate with Krupin O'Brien LLC, where she represents management before courts and administrative agencies on labor matters and employment-related litigation, as well as counsel's employers on diverse employment and labor matters. She has extensive experience litigating before various federal and state courts defending clients against claims arising under Title VII, ADA, FMLA, and ADEA, as well as state and local law. E-mail: kmm@krupinobrien.com.)

The Complaint Corner

Frustrated Traveler: (...calling the hotel operator from the house phone on the hotel's 33rd floor...) I just checked in five minutes ago and was given the key to my room on the 33rd floor. The magnetic card key doesn't work and I have two heavy suitcases with me. Can you help me?

Bad Reply: Are you sure that you are inserting the key in the correct manner? Maybe if you turn the card key around and try it again it will work this time.

Slightly Better: We've been having lots of problems with our card key system. This happens frequently. Why don't you just come down to the front desk and we will issue you another key. That one will probably work.

Best Reply: I am sorry that you are experiencing problems with your room key. I will have a bell person or security officer bring up a new key right away. They will also assist you with your luggage. Can you provide me with your name and room number? For your protection, they will need to see your identification before issuing you the new key.