

Byers' Market

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by Boyd Byers

Wrestlers get ready to rumble over employment status

Three professional wrestlers have thrown down a challenge to Vince McMahon's World Wrestling Entertainment, Inc. (WWE). But this battle royal will take place in a courtroom, not a ring or a steel cage.

Scott Levy (Raven), Christopher Klucsarits (Chris Kanyon), and Michael Sanders (Above Average) filed a class-action lawsuit against WWE claiming they and every other wrestler under contract with WWE since 2002 are really employees but are improperly classified as independent contractors. They allege WWE wrestlers are required to sign exclusive "booking contracts" that specify the terms of their engagements, such as their characters and costumes, where and when they can wrestle, and — say it ain't so — the outcome of each match. They seek unspecified "financial benefits" that would have come with being employees.

WWE's lawyer says pro wrestlers are "highly skilled professionals" who are paid to "show up and perform," which makes them independent contractors. He also points out that WWE wrestlers, in their signed contracts, acknowledge they are independent contractors and agree to take care of their own healthcare and other benefits.

Grappling with the independent contractor question

The proper classification of workers has plagued employers for years. The IRS has developed a 20-factor test to provide guidance on whether a worker is an employee or independent contractor. The factors can be grouped into three main categories:

1. **Behavioral.** Does the company control or have the right to control what the worker does and how he performs the job?
2. **Financial.** Does the company control business aspects of the worker's job, such as providing workspace, tools, equipment, administrative support, other workers, or reimbursed expenses? Does the worker make business decisions that would affect his profit or loss?
3. **Type of relationship.** Is the relationship ongoing or exclusive? Are the services performed integral to the company's principal business activity?

Businesses must weigh all factors when determining whether a worker is an employee or independent contractor. No one factor or set number of factors is determinative. The key is to

look at the entire relationship, consider the degree or extent of the right to direct and control, and document each of the factors used in coming up with the determination.

Hammerlock for misclassification

It's critical to correctly determine whether individuals who provide services are employees or independent contractors because the consequences of being wrong are severe. In the 1990s, Microsoft settled an IRS audit by paying millions in back taxes and fines and reclassifying 600 independent contractors as employees. The other shoe dropped when the workers sued to recover benefits denied because of their misclassification, including 401(k) pension benefits and the right to participate in the company's employee stock purchase plan. Microsoft paid a reported \$97 million to settle those claims.

Last year, the IRS ordered FedEx to pay more than \$319 million in back taxes and penalties after finding that its Ground drivers, whom the company treated as independent contractors, should be reclassified as employees. FedEx is now facing 50 lawsuits in 36 states by workers claiming they were deprived of overtime pay, employee benefits, and the right to file claims for workers' compensation benefits and unemployment insurance.

As these cases show, wrongfully classifying workers as independent contractors can be more painful than being body slammed and whacked with a folding chair by "Stone Cold" Steve Austin. And there isn't anything fake about it.

He said it

Wrestling is not sport, it is a spectacle.

— Roland Barthes