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Rolling the Dice with Independent Contractors

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Rolling the dice with independent contractors – employee misclassification can prove to be a risky and expensive game of roulette when an injury occurs!

Let's face it – employees are expensive. Labor costs are one of the biggest costs of doing business and go beyond just wages. They also include benefits, payroll, and associated taxes. Businesses with employees are required to comply with a multitude of local and federal regulations, and employees are legally entitled to benefits and protections under federal, state, and local laws.

In Ohio, all employers with one or more employees are required to carry workers' compensation coverage for their employees. A state funded employer must pay workers' compensation premiums based on the number of employees. As inflation and expenses continue to increase, some businesses may be tempted to get creative and classify their workers as independent contractors to avoid the costs associated with employees. While tempting, employers should proceed with caution when classifying workers as employees or independent contractors.

From a workers' compensation perspective, a mislabeled independent contractor can be a very costly mistake. Some small business owners choose to pay for workers' compensation coverage only on themselves, and hire "independent contractors" to do their work. If the owner gets hurt, there is coverage; but if a worker gets hurt, there is no coverage. Workers' compensation coverage does not extend to independent contractors in Ohio; therefore, each independent contractor should maintain their own workers' compensation policy. Unfortunately, this rarely happens; and if the worker is misclassified, the consequences can be severe for the employer.

It seems easy enough – simply label a worker as an independent contractor, give them a 1099 instead of a W2, and maybe even make the worker sign an "independent contractor agreement". The employer assumes this is enough and now they can avoid the hassle and expense of withholding taxes, providing healthcare benefits, and maintaining unemployment and workers' compensation coverage by labeling a worker as an "independent contractor". It's an easy way to avoid expensive problems, right?

Wrong. If an individual who is labeled an "independent contractor" sustains a workplace injury, and failed to pay for their own workers' compensation policy, the injured worker could face a mountain of unexpected medical bills. Some injured workers start to question whether they were ever an independent contractor in the first place. The Industrial Commission of Ohio will become the ultimate arbiter regarding the correct classification.

The "definition" of an independent contractor is shockingly nebulous and subject to interpretation. Both the IRS and the Industrial Commission of Ohio utilize 20 different factors when considering whether an individual is an employee or an independent contractor. The analysis is anything but straightforward, but an employer can start by analyzing the issues considered in the Ohio BWC Independent Contractor/Employee Questionnaire.

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If the Industrial Commission of Ohio finds that a worker was an employee, not an independent contractor, then the employer will find themselves in a precarious position. The employer is now facing medical bills and compensation to be paid – and not covered by a workers' compensation policy. The employer is personally responsible to pay out of pocket, on a dollar for dollar basis. Considering many workers' compensation cases can go on for years, if not decades, this can be an expensive problem. Employers may also be required to pay previously payable workers' compensation premiums in arrears, and may also face tax consequences.

Worker misclassification can sometimes be an honest mistake. As remote work becomes a more commonly accepted practice, the issue becomes even less black and white. Within the grey, lies a lot of risk. Employers should never automatically assume their workforce is appropriately classified, and the issue should be re-evaluated periodically as workplaces continue to evolve. It's always better to consult with an employment lawyer before a problem arises rather than rolling the dice.

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For over 10 years, Nicole Hunter has focused her law practice on exclusively representing the interests of businesses and employers. She defends businesses throughout Ohio and Kentucky who face pending or ongoing litigation related to employment matters, workers' compensation, unemployment defense, and general business matters.