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MICHAEL LASKY

Contracting conundrum warrants your attention

You interview a stellar candidate for a project and your firm offers him or her the job. But here's the catch – the candidate will only accept if they can be classified as an independent contractor, not an employee. Why? It is likely the candidate doesn't want employee-related taxes to be taken out of their paycheck, but does want the flexibility to simultaneously work for other companies.

Can your agency, as an employer, agree to this person's request?

To evaluate the level of risk to which your agency is exposed, you should ask yourself whether the candidate would be:

- Performing the type of assignments any of your employees perform;
- Performing work that is integral to your business;
- Working out of your offices and/or using your equipment;
- Working only for you during the relationship

If the answer to any of these questions is “yes,” your firm assumes significant risk by classifying this worker as an independent contractor. Based upon settled employment law, this candidate will likely be treated as an employee under state and federal law, regardless of the label or title the agency gives them.

As an employee, is this individual entitled to get paid overtime compensation? This depends predominantly on whether the agency pays them a salary, as opposed to an hourly or day rate, and on the job responsibilities. In some states, such as New York, an employer has to tell its new employees in writing upon hire, among other things, what its overtime eligibility is and its regular and overtime rates of pay – and employers have to get a signed acknowledgement from the employee that he or she received this information.

It is more important than ever for firms to re-examine how they classify their personnel. In the past few years, many class-action lawsuits have stemmed from alleged misclassifications of workers: in both the independent contractor vs. employee context, as well as whether a class of employee was required to be paid overtime under the law.

Earlier this year, President Obama enriched the Department of Labor with \$25 million to institute a major “misclassification initiative” aimed at eradicating a perceived, rampant misclassification of workers nationwide. These funds enabled the hiring of 177 new enforcement personnel and federal agencies can now share information more widely and regularly. States are undertaking similar initiatives. In fact, some of our marketing communications agency clients have already reported being the subject of state Department of Labor audits regarding independent contractor classifications.

Especially in a time of budget shortfalls, these initiatives increase the likelihood that PR agencies will be audited more often and on a larger scale. This also means non-compliant agencies will have to pay damages, including back wages, overtime, back taxes, back benefits, interest, penalties, and attorneys' fees for misclassifying workers. Pending federal legislation would increase these penalties.

In coordination with skilled employment counsel knowledgeable about the marketing communications industry, now is the time to reassess how you classify your workforce and proactively make necessary changes to limit future risk to your firms. ■

Michael Lasky is a senior partner at the law firm of Davis & Gilbert LLP, where he heads the PR practice group and co-chairs the litigation department. He can be reached at mlasky@dglaw.com.