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### Freelancers may be far from 'free' to the agencies that employ them

In its March 16 issue, *PRWeek's* Agency Business column extolled the benefits of using freelancers in a down economy. Clearly, firms now seek to do more with less, and reduce salary, benefits, and tax costs. Many agencies use freelancers to attain these goals, but in doing so, are unknowingly taking significant liability.

The word "freelancer" has no legal meaning. The law distinguishes between an employee (for whom the employer has tax and employee benefits obligations) and an independent contractor (who is paid without withholdings or benefits). Contrary to common belief, the distinction between workers who are properly classified as "employees" and "independent contractors" is based on a multifaceted legal test. It is not simply a choice to be made unilaterally by the agency or freelancer.

The consequences for misclassifying freelancers can be severe to a firm, including being required by government authorities to pay back taxes, interest, and penalties. Government agencies have been cracking down on independent contractor use, especially in these times of budgetary shortfalls. Several states have formed task forces to investigate misclassified independent contractors. Misclassified freelancers might also be able to sue employers for unpaid benefits and overtime pay.

So what can an agency do to reduce exposure?

■ **Carefully determine independent contractor/employee status.** Firms should develop (in consultation with legal counsel) a checklist to review before engaging a freelancer. The following questions should be asked: Does the freelancer have his or her own business entity?

Will they supply their own equipment? Will they set their hours? Can they simultaneously work for other PR firms? Will they control how they perform their work (as opposed to taking direction from agency staff)? Will they provide skills and expertise not possessed by the agencies' employees? The answer to most, if not all, of these questions should be "yes" if the freelancer is to be classified as an independent contractor.

■ **Limit exposure for those classified as an independent contractor.** This can be done in many ways. First, have a written agreement with the independent contractor. Second, limit agency control of how and when the work is performed, minimize supervision of the freelancer, and ask the freelancer to establish a business entity, such as a corporation or limited liability company. Third, do not provide equipment, company business cards, or company e-mail addresses to the freelancers.

■ **When in doubt, put the freelancer on payroll.** The legal risks associated with using freelancers can be significantly reduced by putting them on the payroll and classifying them as employees. Creative compensation arrangements can be developed with professional assistance to reduce salary and benefits costs. This approach also eliminates risk of an expected liability for back taxes and penalties – sometimes years after the freelancer is no longer working with the agency. ■

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