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THE MARLAR CASE: "THE AGONY AND THE "EXTASY"  
FOR INDEPENDENT CONTRACTORS: IT DEPENDS ON YOUR POINT OF VIEW

Jay Soled has it all wrong. Metaphors aside, the real shame in the Marlar Case is not nudity in a show booth, but the contortions that businesses must go through to avoid the dreaded employee/independent contractor controversy. To that end the Marlar Case should signal the final curtain call (all puns intended) to the IRS charade of attacking innocent businesses over their choice of doing business. The Marlar Case is not an indictment of shrewd businesses twisting the law to their own advantage, but a desperate maneuver to comply with a law that is so agonizingly subjective it threatens small businesses very existence.

Whether you're dealing with the 20 factors, the IRS worker classification manual, including new definitions such as behavioral and financial controls, the classification settlement program, shifting the burden of proof to the IRS as in the McClellan Case, early referral to appeals, or new code section 7436 which allows tax court de novo review of the independent contractor controversy, the road is fraught with danger. The only ecstasy an employer can achieve is getting Section 530 protection.

During my tenure as chairperson of the AICPA Small Business Taxation Committee, I proposed a simple 3 point test for determining independent contractor status. This test challenged the IRS to live up to their statement that they are not biased against independent contractors but that a reporting system that includes withholding is better for compliance. They showed their bias for employee status by not supporting this simplified approach.

My 3 prong proposal was as follows:

- (1) All Independent Contractor relationships must be evidenced by a written agreement between the parties. The salient points of the agreement are:
  - (a) Description of the services to be provided and the duration of the agreement.
  - (b) The remuneration to be paid by the business to the worker.
  - (c) Agreement that the individual worker is responsible for his own federal and state income taxes, including social security taxes, and any other taxes.
  - (d) Agreement that the business does not provide the worker with fringe benefits.
  - (e) Acknowledgement by the individual worker that he has complied with applicable business licensing requirements and that he maintains his own set of books and records.

- (f) Acknowledgement by the parties that their relationship is in fact that of an independent contractor.
- (2) De minimus withholding will be taken from the independent contractor. (This creates the incentive for compliance that the IRS said they wanted so badly).
- (3) File all 1099's

Admittedly, point #2 was the most controversial. However, in my mind it was a small price to pay to achieve 100% ironclad certainty that independent contractor status could never be challenged by the IRS.

Any other proposal (and there have been many) reinvents the convoluted and confusing structure that is already in place; subjective hard to define terms that triggers governmental jihad against free enterprise.

So, I say to the Jay Soleds of the world – simplify the independent contractor rules the way I propose. Then businesses can get down to business including, if they choose, monkey business.

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