

Zinsergram a/k/a Legal Update



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In the past 12 months, I have personally tried 12 cases involving the issue of whether a newspaper carrier is an employee or an independent contractor. To be successful with such a case, extensive preparation is essential. When preparing cases, a lawyer learns all the good points and the bad points. While preparing for these 12 cases, I learned about many independent contractor-sensitive “snafus” by Circulation Management. This column will share 10 of the most common issues I discovered.

1. **Contracting Before Delivery** – In several situations, Circulation Management allowed a newspaper contractor to start delivery of a home delivery route *before* the contractor actually signed a written Independent Contractor Agreement. This is a major problem. You could be the victim of “Murphy’s Law.” Just imagine the confusion and finger pointing if the independent contractor newspaper carrier has a serious automobile accident while delivering without a contract.
2. **Separate Contracts for Separate Routes** – It is considered evidence of independent contractor status if a newspaper carrier has the right to contract for more than one delivery area. The best practice is for the independent contractor to sign a separate Independent Contractor Agreement for each individual route or delivery area. In my preparation, I discovered that Circulation Management was missing this opportunity by merely penciling in the number of the new route when the contractor agreed to deliver to a second area.
3. **Contract Compliments Course of Dealing** – Judges and Hearing Officers will give the written agreement great respect if the day-to-day course of dealings and practices of the parties are consistent with the written agreement. One of things discovered in my preparation is that the written agreement contained contract language that simply did not apply to the particular contractor. While I was able to explain this away and obtain an independent contractor ruling, it would have been more independent contractor-friendly if the written agreement reflected the reality of the relationship.
4. **Contractor Receives Copy of Contract** – From an independent contractor point of view, it is absolutely the best practice to give the independent contractor newspaper carrier a copy of the written

agreement after it is negotiated. While preparing one of my cases, we discovered a questionnaire completed by the independent contractor, claiming to be an employee. In that questionnaire, the contractor checked a box that said he did not sign a written agreement. In preparation, when I asked my witness why the independent contractor would make such a statement, I learned that this particular Manager did not routinely give contractors copies of the agreement. That looks really bad when you are trying a case.

5. **Substitutes** – In my opinion, the greatest single distinguishing factor of independent contractor status is the contract right and obligation of the contracted carrier to utilize a substitute if the contracted carrier does not want to personally perform the services. Employees may not engage substitutes. Typically, the independent contractor may use substitutes without restriction. The sub can use whomever he/she wants to use; the contracted carrier directly pays the substitute. If, for any reason, the contracted carrier is unable or unwilling to deliver on a particular day, the contract obligates the contractor to find a substitute. What I discovered while preparing for one case is that the particular manager was not following the contract and obligating the contracted carrier to find a substitute. Rather, the Manager was maintaining “on-call” substitutes that were provided a 1099 from the Publishing Company at the end of the tax year. This was not an independent contractor-friendly practice and the newspaper has ceased it.
6. **Contract Termination Provision** – I recommend that a contract termination provision be bilateral, meaning that the provision applies with equal force to both the Publishing Company and the contractor. What I learned in preparation is that when a contractor terminated the agreement, the Publishing Company was not requiring the contractor to do so in writing with 30 days notice, as required by the Independent Contractor Agreement. Management was religious in writing letters when it terminated a contract. However, contractors were given a pass. The newspaper has cleaned up that bad practice.
7. **Recruitment Ads** – It is very common for a newspaper to run ads in its own publication, trying to recruit individuals to be independent contractor newspaper carriers. The text of this ad can be very helpful or hurtful. What I discovered in preparation is that a particular newspaper was discovering an extremely poorly drafted ad. It was also attempting to recruit substitutes. The newspaper has now changed its advertising practices. The ad refers to the contract as a “business opportunity” and has the “independent contractor” phraseology that will support the Company in future litigation.

8. **Contractor Compensation** – The written agreement should reflect all of the compensation being paid to the contractor. That prevents misunderstandings and is independent contractor-friendly. In preparing one case, I discovered that the independent contractor was paid an additional contract fee if the contractor bagged the newspapers with poly-bags, with an advertiser’s imprint on them. However, the written agreement did not reflect that additional contract fee. While the fee was paid, the contract was silent. That has been fixed.
9. **Start With a Blank Slate** – One of the key factors of independent contractor status is the right of the contractor to negotiate the agreement and the fees/rates contained therein. Often, a contractor will give testimony that he did not have the right to negotiate, stating that when he sat down with a Manager, all of the blank spaces were already typed in. The witness testifies that it looks like “take it or leave it.” It looks like a “done deal.” On all items that are negotiable, start the contract in process with those spaces blank. Then, in the negotiating process, you will put those numbers in your handwriting in ink on the agreement. That will more likely support Management’s argument that the contract was negotiated.
10. **Party to Deception** – In preparing one case, the contractor was the party that terminated the Independent Contractor Agreement. I was inquiring of the Management witness the reason for the termination. The Manager then sheepishly said that the contracted carrier, who had a full-time job with a manufacturing company, had lost the full-time job. The contractor was planning to file for unemployment compensation. The contracted carrier wanted to be able to complete unemployment papers saying that he had no work of any kind. The contractor asked the Manager to have his spouse sign a new contract. The same individual is going to be delivering the route. This is a problem. The newspaper was complicit in deceiving the State Department of Unemployment. I recommended against this.

Conclusion

This writer recommends that you do a complete annual audit of your independent contractor practices. You may be surprised as to what you find out there lurking to jump up and bite you if you end up in litigation. Preventive legal medicine is the best legal medicine. I hope you will take this advice to heart.