



**OHIO NEWSPAPER ASSOCIATION  
DISTRICT MANAGER TRAINING  
COLUMBUS, OHIO  
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**DISTRICT MANAGER  
THE KEY TO INDEPENDENT CONTRACTOR VICTORY**

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## Independent Contractor Status

### ***Sources of Scrutiny***

The following laws will dramatically impact your newspaper, depending upon whether your newspaper carriers are employees or independent contractors:

- ◆ National Labor Relations Act
- ◆ State Unemployment Laws
- ◆ Workers Compensation
- ◆ Fair Labor Standards Act
- ◆ Tort Laws
- ◆ Antitrust Laws
- ◆ State and Federal Tax Laws
- ◆ Immigration Reform Act
- ◆ Title VII of the Civil Rights Act of 1964
- ◆ The Age Discrimination in Employment Act
- ◆ 1991 Civil Rights Act
- ◆ Americans with Disabilities Act
- ◆ Family and Medical Leave Act of 1993
- ◆ Affordable Care Act (“Obamacare”)

### ***Contractual Relationship***

The relationship between the Publishing Company and its carriers is a contractual relationship. Your written contract is your first line of defense in a lawsuit that puts at issue the independence of your carriers and/or distributors. This written agreement must be drafted to preserve independent contractor status. Your day-to-day contact with the carriers should be consistent with the written agreement.

### ***Newspaper Carriers and Independent Contractor Status***

Placing the “label” independent contractor on a carrier is not controlling. Whether a carrier is an employee or an independent contractor depends upon all of the factors of the relationship between the Publisher and the carrier. There are hundreds of reported newspaper cases involving this key issue. A review of these cases reveals that the following factors are evidence of independent contractor status:

## Independent Contractor Status

1. Carrier solicitation and delivery to customers outside the strict boundaries of his/her assigned territory;
2. Carrier's right to negotiate route boundaries and other contract terms;
3. Carrier's ability to charge a subscriber more than the Publisher's suggested retail price;
4. Carrier's right to negotiate the wholesale rate charged carrier or right to negotiate contract fees paid carrier;
5. Carriers, by contract, are financially responsible for any damages they cause while delivering newspapers;
6. Carrier's contract compensation fluctuates up and down, depending on the number of newspapers delivered;
7. Carrier's investment of time and money to obtain new subscribers;
8. Carrier's right to cancel a subscriber for nonpayment of the bill;
9. Carrier's right to choose not to place newspapers in a tube;
10. Carrier's right to purchase poly bags (or any supplies) from any source;
11. Carrier's right to decide if and when poly bags will be used;
12. Carrier bears the risk of loss for lost or stolen newspapers;
13. Carrier bears the risk of loss for unsold newspapers;
14. Carrier's obligation to furnish a bond to secure performance;
15. Carrier's right to determine when and how subscribers will be billed;
16. Carrier's right to collect in advance from subscribers;
17. Carrier's right to choose a substitute;
18. Carrier's right to decide what to pay his chosen substitute;
19. Carrier's right to deliver other publications — even competing publications;
20. Carrier's right to have a voice in the selection of bundle drop points;
21. Carrier's flexibility in meeting delivery deadlines;
22. Carriers set their own working hours;
23. Carrier's obligation to handle subscriber complaints or pay publisher in the event Publisher delivers a complaint; do you charge the carrier money for any other type of complaint?
24. Written contract indicating an independent contractor relationship;
25. A requirement that the Publisher give at least 30 days advance written notice in the "without cause" termination context;
26. Carrier's obligation to purchase all insurance;

## Independent Contractor Status

27. The Publishing Company furnishes to carrier no employee-like benefits (e.g. health insurance, vacation, et al.);
28. Carrier's right to choose type of vehicle used for delivery;
29. Carrier's obligation to purchase vehicle and pay all expenses;
30. Carrier's right to employ helpers;
31. Carrier's obligation to file all state, federal, and local tax returns and to cover carrier's employees, if any, for unemployment tax and worker's compensation purposes;
32. The Publisher files 1099 for carriers;
33. Carriers file a Schedule C return as a self employed business person;
34. The Publishing Company withholds no taxes of any kind from monies due carrier under the contract;
35. Carrier's right to determine sequence of route delivery; route lists, audio tapes, and computerized devices (software);
36. A stated term in the carrier's contract;
37. The carrier purchases a business license;
38. Language in a carrier recruitment ad that indicates independent contractor status;
39. A contract provision that prohibits carrier from using the logo or trademark of the Publishing Company; carrier is not provided business cards, uniforms, or signs for on the carrier's vehicle;
40. Carriers receive no "training" as to "how to" deliver newspapers; "Showing the area to carrier is fine, especially if the departing carrier gives the orientation;
41. A contract provision requiring the carrier to indemnify the Publishing Company;
42. Carriers are unsupervised or unmonitored while they deliver newspapers;
43. Carriers perform all of their contract services away from the premises of the Publishing Company; there is no advantage to allow the loading dock or distribution center to be a "social club" for carriers;
44. A contract provision indemnifying the Publisher from the carrier's telemarketing efforts;
45. The fact that the carrier advertises or markets his/her services in some way;
46. Carriers are not required to attend group meetings;
47. Carrier has the right to have direct contact with subscribers.

Courts and agencies weigh the factors and decide the status of the carrier. No one factor is determinative. You do not have to be perfect to prove independent contractor status. In those cases where Publishers are successful in proving independent contractor status, some of the factors always evidence employment.

**The key is achieving a defensible mix of factors enabling you to prove independent contractor status.**

### ***State Agency Connections***

State departments of unemployment aggressively challenge independent contractor status when they can. They also are aggressively taking the position that carriers are employees for obvious revenue purposes. Close, serious scrutiny of carrier unemployment claims is crucial. Do not treat them routinely. The same advice applies to claims for workers' compensation. Some of the state agencies have a questionnaire with "loaded" questions designed to gather evidence of employee status. Again, proceed cautiously and with advice of counsel.

### ***Contract Audit***

Your contract with your independent contractors should be reviewed to determine its legal viability in light of these recent developments. Preventive medicine is the best medicine in this situation.

### ***Achieving the Goal***

Independent contractor status — the goal can be achieved! If you truly desire to have independent contractor newspaper distributions, you can have them. You must first make a Management decision that it is important to you. If it is important to you, you must be willing to fight—i.e. litigate — to preserve this right. Those who tenaciously fight for independent contractor status will have it.

### ***Marketing***

Newspaper Circulation Managers sell newspapers. Lawyers sell ideas and concepts to judges. Maintaining this status is an ongoing marketing and promotion campaign. If the marketing plan is in place, selling the concept will be much easier in the courthouse. Elements of the marketing plan include:

1. **Carrier Recruitment** — The text of ads you run can be a positive piece of documentation of independent contractor status. "Business Opportunity" is a good title for the ad. The ad should emphasize signing a contract.
2. **Application Form** — Do not use the usual employment application. Design your own "Independent Contractor Information Sheet."
3. **Written Contract** — Your contract can be your most positive marketing tool. Utilize the term "contractor" instead of "carrier." Build into this agreement as many indicators of independent contractor status as possible. The written contract will be read by the judge or hearing officer. It creates an impression.

4. Carrier Handbook — If you are going to have one of these, adopt it to be a promotion tool for independent contractor status. Avoid turning it into a book containing “work rules” akin to those usually found in an employee handbook. Be very careful here.
5. Written Communication — When communicating with contractors, write a personalized letter on Company letterhead. Do not use the “interoffice memo” you might use to communicate with your inside employees. Refer to specific contract language when possible. Avoid giving orders or instructions, as well as any language giving the appearance of “discipline.”
6. Terminology — Remember, you do not “fire” contractors. We terminate their contracts. More than one judge has noted testimony by circulation managers claiming to “fire” carriers. The terminology markets a thought process — an intent. What do District Managers “manage?” You do not “supervise” carriers. You do not “assign” routes. You do not “discipline” carriers.
7. Company Brochures and Employee Handbooks — When describing the distribution system, do not pass up the opportunity to describe the independent contractor status of the individuals delivering your newspaper.
8. Training — Teach the independent contractor concept to everyone who has any contact with the contractors. This includes District Managers, Zone Managers and customer service clerks. These individuals “create” the evidence that will promote or tear down the independent contractor concept.

### **Litigation**

The courthouse is where we “close the deal.” If we have done our marketing homework, this is where the ultimate sale is made. Do not be awed by the lawyers. Remember, you know more about your operation than anyone else. Knowledge of and belief in the product are keys to successful selling. If you know and believe in the independent contractor concept, you can sell it to the judge! You can be more persuasive than the other side. The following tactics are very helpful:

1. Contractor Witnesses — We want 2 or 3 contractors to testify in support of our case. Pick those contractors who are regarded as “pains in the neck.” They will “look, feel and smell” like independent contractors.
2. Preparation — All witnesses should be thoroughly prepared for their testimonies. Make sure every positive piece of evidence finds its way into the record.
3. Perseverance — Never, never, never give up! In many cases you will be forced to go to an appellate level to get justice. You can often expect a jury or an administrative agency to make a mistake. Be sure you make a good record for appeal. The appellate courts are most likely to correctly apply the law to the facts.

### **Decision Time**

Litigation is expensive. You must ask how much you are willing to spend to preserve the independent contractor. Analyze the total cost of employee status. If your carriers are employees, many state and federal laws impact you in many ways. You may decide it is worth a lot to keep the independent contractor system intact.

## **State Legislative Developments**

Newspaper industry initiative on the state level is where the action is today. On the theory that the best defense is a massive offense, offensive action in the form of legislative change has resulted in new newspaper exemptions in key statutes.

### **I. Montana**

As in many states across the country, Montana's unemployment agency has been actively pursuing a course of reclassifying as "employees" newspaper distributors traditionally considered to be independent contractors. The reason for this is clear. This is a naked grab for more tax revenue. The state action has been totally arbitrary action.

Several years ago, the state unemployment agency attacked the independent contractor status of adult newspaper carriers of the *Billings Gazette*, the largest daily in Montana. This action was arbitrary. Never before had the state agency claimed the adult carriers to be employees. The *Billings Gazette* decided to fight back. It pursued massive discovery requests for information from the state agency. As you might expect, the state was reluctant to turn over its investigative files—for fear of the revelations of arbitrary and capricious action on the part of the bureaucrats.

After the litigation was ongoing for a couple of years, the *Billings Gazette* and the unemployment agency called a "cease-fire." An agreement was reached in which the state agreed to drop the action if the *Billings Gazette* pursued and succeeded in amending the statute to exclude adult carriers from the definition of employment. Under the leadership of Publisher Wayne Schile, the newspaper industry went to the legislature.

Established lobbyists in the state capitol laughed, saying special interest legislation would never be passed for newspapers. They were dead wrong! The legislation passed both houses of the legislature by overwhelming majorities. The new amendment reads as follows:

39-51-204 Exclusions from definition of employment

(1) The term "employment" does not include:

...(g) services performed as A NEWSPAPER CARRIER OR



FREE-LANCE CORRESPONDENT IF THE PERSON PERFORMING THE SERVICES OR A PARENT OR GUARDIAN OF THE PERSON PERFORMING THE SERVICES IN THE CASE OF A MINOR HAS ACKNOWLEDGED IN WRITING THAT THE PERSON PERFORMING THE SERVICES AND THE SERVICES ARE NOT COVERED. AS USED IN THIS SUBSECTION:

(I) "FREE LANCE CORRESPONDENT" IS A PERSON WHO SUBMITS ARTICLES OR PHOTOGRAPHS FOR PUBLICATION AND IS PAID BY THE ARTICLE OR BY THE PHOTOGRAPH; AND

(II) "NEWSPAPER CARRIER" MEANS A PERSON WHO PROVIDES A NEWSPAPER WITH THE SERVICE OF DELIVERING NEWSPAPERS SINGLY OR IN BUNDLES. THE TERM DOES NOT INCLUDE AN EMPLOYEE OF THE PAPER WHO, INCIDENTALLY TO HIS MAIN DUTIES, CARRIES OR DELIVERS PAPERS.

Under Montana law, newspaper distributors engaged in home delivery or single copy distribution are now exempt from unemployment laws; so are bundle haulers. These distributors are not eligible for unemployment benefits; the newspaper will not be required to pay unemployment taxes on their earnings. The key to taking advantage of this exemption will be drafting your contract to specifically acknowledge no coverage for the contractor.

## **2. Ohio**

In an effort to preclude any age limitations or restrictions on the use of newspaper carriers, the Ohio Legislature, at the instigation of the industry, passed a law declaring that minors who are engaged in the delivery of newspapers to the consumer are exempt from the requirements imposed by the Ohio Minor Labor Laws. Ohio defines a minor as "any person less than 18 years of age." The exceptions to coverage by the Ohio Minor Labor Laws are found in Ohio Revised Code 4109.06. Specifically, 4109.06(6) states that "minors engaged in the delivery of newspapers to the consumer" are excepted from the requirements of the Ohio child labor laws.

Along with minors who deliver newspapers, 4109.06 was revised to exempt from coverage "minors who are engaged in lawn mowing, snow shoveling and other similar residential employment" conducted on a casual basis. Thus, it is apparent the Ohio Legislature has recognized that the various and sometimes onerous requirements of labor code provisions concerning minors should not act to defeat the institution of the newspaper carrier.

### **3. Washington**

Unemployment auditors from the State of Washington, like those all around the country, have been unusually aggressive toward independent contractors. To stop the harassment, Allied Newspapers of Washington and its Executive Director Rowland Thompson have achieved legislative change with the passage of Senate Bill 5476.

This legislation inserts language that excludes newspaper distributors and freelancers from the definition of “employment” for purposes of unemployment compensation, workers’ compensation, and state wage and hour laws. The beauty of the exclusion is that you never have to argue whether an individual is an employee or an independent contractor. If you meet the definition of the exclusion, the Act just does not cover the individual relationship.

The following relationships are excluded from the definition of “employee” under the new law:

- (f) Any newspaper vendor, carrier, or delivery person selling or distributing newspapers on the street, to offices, to businesses, or from house to house and any freelance news correspondent or “stringer” who, using his or her own equipment, chooses to submit material for publication for free or a fee when such material is published.

### **4. Illinois**

A statute passed by the Illinois State Legislature is a good example of the positive results that can be accomplished through lobbying efforts on behalf of newspapers.

This bill amends the Illinois Unemployment Insurance Act so that certain services performed for newspapers are exempted from coverage, which means lower unemployment insurance taxes for Illinois newspapers. The language of the statute is as follows:

#### *Performance of Certain Services for a Newspaper*

- (A) The term “employment” shall not include services performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news.
- (B) The term “employment” does not include the performance of free lance editorial or photographic work for a newspaper.
- (C) The term “employment” does not include the delivery or distribution of newspapers or shopping news to the ultimate consumer if:
  - (1) substantially all of the remuneration for the performance of the services is directly related to sales, “per piece” fees, or other output, rather than to the number of hours worked; and
  - (2) the services are performed under a written contract between the individual and the person or firm for whom the services are performed, and the contract

provides that the individual will not be treated as an employee for federal tax purposes.

- (3) Delivery or distribution to the ultimate consumer does not include:
  - (i) delivery or distribution for sale or resale, including but not limited to distribution to a newsrack or newsbox, salesperson, newsstand or retail establishment;
  - (ii) distribution for further distribution, regardless of subsequent sale or resale.
- (D) Subsection (C) shall not apply in the case of any individual who provides delivery or distribution services for a newspaper pursuant to the terms of a collective bargaining agreement and shall not be construed to alter or amend the application or interpretation of any existing collective bargaining agreement. Further, subsection (C) shall not be construed as evidence of the existence or nonexistence of an employment relationship under any other section of the Illinois Unemployment Insurance Act or other existing laws.

This statute is a good illustration of the power newspapers have as a group to influence legislation in their behalf. Under this new law, newspaper carriers, whether adult or youth, are not eligible for unemployment compensation benefits; the profits of newspaper carriers will not be considered wages for unemployment compensation tax purposes.

## **5. Arkansas**

On March 13, 1995, the Arkansas State Legislature successfully passed a law that exempts newspaper carriers from the provisions of the state employment security law. The law exempts "services performed by an individual in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution." Despite strong opposition from labor and a veto by the governor of Arkansas, the Arkansas Press Association led a successful drive to override the veto and pass the exemption.

## **6. Virginia**

On March 8, 1997, the Virginia legislature amended its unemployment tax code's direct seller provision to specifically reference newspaper carriers:

The term "employment" shall not include:

...Services performed by an individual as a 'direct seller' provided that:

- (a) such person ... is engaged in the trade or business of the delivery or distribution of newspapers or shopping news (including any delivery

services directly related to such trade or business).

The provision was passed after the September 1996 hearing and before the April 25, 1997 Virginia Employment Commission ruling that newspaper carriers are direct sellers under the general direct seller provision in the *Daily News-Record* case. The *Daily News-Record* case offers protection for newspapers for tax audit periods before March 8, 1997; the new statute offers future protection.

## **7. Missouri**

Congratulations to the Missouri Press Association ("MPA") for successfully lobbying the State Legislature to exempt newspaper carriers from the unemployment statute! Under the leadership of Executive Director Doug Crews, the MPA caused the statute to be amended to force recognition of carriers as independent contractors:

The term "employment" shall not include:

- (3) Service performed by an individual in the delivery or distribution of newspapers or shopping news, including delivery or distribution to any point for subsequent delivery or distributions and
- (16) Services performed as a direct seller who is engaged in the trade or business of the delivering or distribution of newspapers or shopping news, including any services directly related to such trade or business...

*Editor's note:* L. Michael Zinser acted as legislative counsel to MPA in this matter.

## **8. New York**

The New York Department of Labor has promulgated guidelines to establish whether the relationship between workers in various newspaper publishing industry occupations and newspapers is that of employment or independent contractor for the purpose of determining eligibility for unemployment insurance benefits.

For carriers, the following factors tend to show a carrier is independent:

- 1. Freedom to determine sequence;
- 2. Not required to attend meetings;
- 3. Freedom to hire helpers or substitutes;
- 4. No written reports required;
- 5. Freedom to add or delete customers to/from the route;
- 6. Freedom to engage in other business, including delivery of other newspapers;
- 7. Compensation is not hourly;
- 8. Does not use the newspaper name or logo on his/her car, uniform or business cards;

9. Has ultimate responsibility to solve customer complaints;
10. Provides his/her own vehicle.

The following factors are held to be neutral in determining whether a carrier is an employee or an independent contractor:

1. A delivery deadline;
2. A ban on placing unauthorized material in or on the newspaper;
3. Billing and collection directly by the newspaper;
4. The carrier is contractually obligated to hold the newspaper harmless;
5. The carrier is required to maintain confidentiality of the customer list;
6. The newspaper provides tubes and stakes;
7. The newspaper provides rubberbands and poly bags.

## **9. North Carolina**

### **A. Unemployment Compensation**

On June 4, 2003, in an act of legislative sanity, the General Assembly of North Carolina, following the lead of the Senate, passed into law an amendment to its workers' compensation law that reads, in pertinent part:

It shall be a rebuttable presumption that the term 'employee' shall not include any person performing services in the sale of newspapers or magazines to ultimate consumers under an arrangement whereby the newspapers or magazines are to be sold by that person at a fixed price and the person's compensation is based on the retention of the excess of the fixed price over the amount at which the newspapers or magazines are charged to the person.

This law was passed in response to the ambiguities created by the poorly decided (and ultimately settled) *Enquirer-Journal* case.

This is not a total exemption. It is a rebuttable presumption, meaning a plaintiff, with strong proof, could still prove employee status. This new presumption does **not** apply to newspapers utilizing a "per piece" contractor compensation system. It applies **only** if the buy-sell relationship exists.

*Editor's note:* Publishers in North Carolina should carefully review their independent contractor agreements and, if necessary, redraft to take advantage of this law.

### **B. Sales Tax**

For decades, the newspaper industry enjoyed a sales tax exemption in North Carolina. The exemption read, "... sales of newspapers by newspaper street vendors, by newspaper carriers making door-to-door deliveries, and by means of vending machines." Effective January 1, 2014, that exemption has been repealed.



If a newspaper's contract with its newspaper carrier does not wholesale the paper to the carrier, but rather pays the carrier a negotiated per-copy fee, then the sale is from the Publishing Company directly to the subscriber. Therefore, the Publishing Company must collect the tax from the subscriber and remit to the state.

What if the newspaper still has a buy/sell relationship with the carrier? In that context, the sale is from the carrier to the subscriber. Technically, the independent contractor newspaper carrier is responsible for collecting and paying the tax. Currently, North Carolina Publishers are trying to decide whether to have the carriers pay the tax directly or to collect and pay the tax for the carriers.

Independent Contractor Agreements should be drafted to make it clear that the contractor is responsible for the collection of the tax. Some North Carolina Publishers are considering collecting the tax in the buy/sell relationship. Giving the contractor a choice to pay the tax directly or to pay the Publishing Company a fee for the Company to forward the tax would give the Publisher some independent contractor cover.

#### **10. Massachusetts**

The Massachusetts workers' compensation statute was amended in 2004 to provide the following test for independent contractor status:

- (1) The individual is free from control and direction in connection with the performance of a service, both under his contract for the performance of service and in fact; **and** (2) The service is performed outside the usual course of the business of the employer; **and** (3) The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

The statute provides for civil and criminal penalties. While enacted to deal with extensive subcontracting in the construction industry, the changes in the law are not limited to the construction industry.

The second part of the test would be the key problem. It is critical that Publishing Companies identify themselves as Manufacturing Companies and not being in the business of distributing newspapers. Special scrutiny should be paid to your written independent contractor agreements. Showing that independent contractor newspaper carriers perform their services away from the employer's premises will not be enough to meet this prong.

## **11. Vermont**

At the insistence of the Teamsters Union, the Vermont Department of Labor promulgated a rule to make it more difficult for newspaper carriers to be considered independent contractors. The rule arbitrarily overturns seven years of administrative interpretation recognizing newspaper carriers as totally exempt from the Unemployment Statute.

The Vermont Press Association mobilized the state's daily publishers to present oral and written testimony against the rule. The Legislative Committee on Administrative Rules voted 5 to 3 to disapprove the rule. The publishers have also met with the Governor. Stay tuned.

*Editor's note:* The Zinser Law Firm, P.C. represented the Vermont Press Association.

## **12. Wyoming**

In 2012, the State of Wyoming targeted newspapers and their relationships with independent contractor newspaper carriers. One of the State Auditors told a newspaper Publisher that newspapers had specifically been targeted. Many newspapers were under investigation, with the State ready to challenge the independent contractor status of newspaper carriers.

The Wyoming Press Association sprung into action and found sponsors for legislative change. After going through the legislative process, the Press Association achieved language making it clear that Home Delivery newspaper carriers are *not* employees for purposes of Wyoming unemployment compensation tax and benefits. That language reads as follows:

(a) Employment under this act does not include service performed:

(iv) By an individual under the age of eighteen (18) **or** as a direct seller or independent contractor in the business of distributing or delivering newspapers or shopping news excluding the delivery or distribution at any point for further delivery or distribution; but including directly related services such as soliciting customers and collecting receipts, provided:

(A) All or substantially all of the individual's pay for the service, whether or not paid in cash, directly relates to sales or other output rather than to the number of hours worked; and:

(B) The individual performs the service under a written contract with the newspaper or shopping news publisher, which specifies that the individual will not be treated as an employee with respect to the services for federal tax purposes.

## Federal Legislative Developments

### ***U. S. Senate Acts to Protect Carriers***

In November, 1995, the U. S. Senate, as part of its budget bill, passed a provision authored by Senator Robert Dole that treats all newspaper carriers as direct sellers for purposes of the Internal Revenue Code. The provisions treat carriers as direct sellers even if the carriers are paid by the piece (the so-called agency system) and do not purchase at wholesale. A carrier qualifies “provided substantially all of the remuneration for the performance of the services is directly related to sales or output rather than to the number of hours worked and the services performed ... are performed pursuant to a written contract ... and such contract provides that the person will not be treated as an employee for federal tax purposes.”

Recognizing the abuse of the IRS and the need for independent contractor status, Senator Dole’s office states the following:

- ◆ For many generations, newspaper distribution in the United States has been handled predominantly by independent distributors and carriers. Today, hundreds of thousands of distributors and carriers deliver millions of newspapers every day.
- ◆ Distribution by independent contractors is a crucial link in the delivery of newspapers to readers throughout the country. Independent distribution systems, which take a variety of forms, are efficient, flexible and financially advantageous for the individuals and small businesses that participate in them.
- ◆ These systems have given millions of young men and women their first opportunity to learn the basics of business.
- ◆ The IRS has begun a concerted national effort to destroy the traditional means of newspaper distribution by reclassifying distributors and carriers from independent contractors to employees. The IRS’ effort represents an unwarranted attack on individuals and small businesses with limited resources. These people, despite the merits of their cases, are not able to defend themselves in costly, prolonged audit and court proceedings, and are vulnerable to the Service’s pressure to “agree” to reclassification as employees.
- ◆ Through their reclassification efforts, the IRS is legislating a new tax policy. This is the job of the Congress and not the IRS.

- ◆ Unless Congress acts, thousands of individuals and small businesses that serve as newspaper distributors and carriers will be put at risk. If distributors and carriers are erroneously reclassified as employees, they will suffer immediate, serious harm. They will be saddled with greater financial burdens, increased regulatory obligations, and less control of their businesses; many may lose their jobs altogether. These small businesses should be encouraged in their job-creating enterprise, not rendered salary bound employees by an IRS that has usurped Congressional authority.

This provision was not part of the House version of the Budget Bill. When the House and Senate pass differing versions of a bill, it goes to Conference Committee to work out the differences.

In late November the Conference Committee completed its work, leaving intact the newspaper carrier provision authored by Senator Robert Dole. The Balanced Budget Reconciliation Act of 1995 was sent to President Clinton. He vetoed the bill.

### ***Independent Contractor Status Preserved***

On August 2, 1996, Congress sent President Clinton a piece of legislation raising the minimum wage. The bill, H.R. 3448 titled "Small Business Job Protection Act of 1996" was signed and became law on August 20, 1996. Bundled with it is Section 1116 which, for Federal tax purposes, treats adult newspaper carriers as "direct sellers." The person performing services as a direct seller shall not be treated as an employee. The person for whom such services are performed shall not be treated as an employer.

### **How it works**

Under the law, a person engaged in the trade or business of the delivery or distribution of newspapers or shopping news (including any services that are directly related to such trade or business) qualifies as a direct seller if:

- (1) substantially all the remuneration for the performance of the services is directly related to sales or other output rather than to the number of hours worked, **and**; (2) the services are performed pursuant to a written contract, **and**; (3) the written contract provides that the person will not be treated as an employee for Federal tax purposes.

The law is intended to apply to newspaper distributors and carriers whether or not they hire others to assist in the delivery of newspapers. The "direct seller" exemption applies to newspaper distributors and carriers operating under either a buy-sell distribution system (i.e. where the newspaper distributors or carriers purchase the newspapers from the publisher) or an "agency" distribution system. Thus, newspaper distributors and carriers operating under an agency distribution system who are paid based on the number of papers delivered and have an appropriate written agreement qualify as

direct sellers. This law applies to services performed after December 31, 1995.

The law clarifies the worker classification issue for Federal income and employment taxes only. The provision will have no impact on whether newspaper carriers and distributors are independent contractors under federal, state, or local labor laws.

### **Significance**

The IRS is out of the business of arbitrarily attempting to reclassify newspaper carriers and distributors to employee status. The IRS, in a naked grab for cash, has aggressively attacked independent contractor status of newspaper carriers in recent years. The agency has also subjected independent newspaper distributors to extortionate litigation in an attempt to get distributors to “cry uncle,” knowing full well they lack the financial resources of Publishing Companies to beat back the attack. This had been an historical and brutal attack on small businesses and entrepreneurship in America. The plague is over for those who qualify as “direct sellers.” This is a tremendous victory for the newspaper business!

### **Brief History**

Senator Robert Dole, a former newspaper carrier himself, in the fall of 1995 first attached the “direct seller” provision to the budget bill sent to President Clinton. The President vetoed the bill.

Senator Dole recognized the abusive nature of the IRS attack on independent contractor status. He recognized the entrepreneurial value of preserving the independence of newspaper carriers everywhere. The America Association of Independent News Dealers (AAIND), as well as the newspaper industry, get credit for persuading Senator Dole of the value of the bill. From the beginning the strategy was for AAIND, playing the role of the champion of the small entrepreneur, to be “out front” and for the newspaper industry to be the “stealth bomber.”



## The Contracting Process

### 1. Complete IRS Form W-9

- ◆ Contractor signs this document.
- ◆ Accounts Payable uses the form to set up IRS Form 1099.
- ◆ Contractor selects the form of business organization.
- ◆ Helps prove contractor is in business for him/herself.
- ◆ Explain to contractor that no taxes will be withheld from contract payments.
- ◆ Explain to contractor that he/she is responsible to pay all federal, state, and local taxes.

### 2. Review of Written Contract

- ◆ Important for Company representative to spend time reviewing the written Agreement with the contractor.
- ◆ Explain up front to the individual that he/she will be an independent contractor and NOT an employee.
- ◆ There should be a page-by-page review giving the contractor an opportunity to ask any questions.
- ◆ Have the contractor initial each page as it is reviewed; this cements the contractor's intention to be an independent contractor.
- ◆ It is important that the Company representative is trained to understand the written Agreement.
- ◆ Start the process with a "blank slate."
- ◆ Document rate negotiations.
- ◆ Give contractor the option to have the contract reviewed by legal counsel.
- ◆ Do not be afraid of negotiations.
- ◆ Be sure contractor reads and understands the "English" language.
- ◆ Explain to contractor that he/she has the right to determine the sequence of delivery.
- ◆ Explain to contractor that he/she will not be eligible for worker's compensation or unemployment compensation.

**3. Next Steps**

- ◆ Review sample invoice with contractor.
- ◆ Review daily computer-generated bundle top.
- ◆ Obtain proof of contractor's valid driver's license and vehicle insurance information.

**4. Independent Contractor Carrier Accident Insurance**

- ◆ Explain the coverage to the contractor.
- ◆ It is important that the Company representative is trained to understand the product.
- ◆ Have contractor complete the enrollment card or the rejection card.
- ◆ If contractor purchases the insurance, give contractor a copy of the policy.
- ◆ Explain to contractor that he/she pays the entire premium.

Form **W-9**  
 (Rev. August 2013)  
 Department of the Treasury  
 Internal Revenue Service

## Request for Taxpayer Identification Number and Certification

**Give Form to the  
 requester. Do not  
 send to the IRS.**

Print or type  
 See Specific Instructions on page 2.

Name (as shown on your income tax return)	
Business name/disregarded entity name, if different from above	
Check appropriate box for federal tax classification: <input type="checkbox"/> Individual/sole proprietor <input type="checkbox"/> C Corporation <input type="checkbox"/> S Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Trust/estate  <input type="checkbox"/> Limited liability company. Enter the tax classification (C=C corporation, S=S corporation, P=partnership) ▶ _____  <input type="checkbox"/> Other (see instructions) ▶ _____	Exemptions (see instructions):  Exempt payee code (if any) _____ Exemption from FATCA reporting code (if any) _____
Address (number, street, and apt. or suite no.)	Requester's name and address (optional)
City, state, and ZIP code	
List account number(s) here (optional)	

### Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on the "Name" line to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

**Note.** If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Social security number									

Employer identification number									

### Part II Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
3. I am a U.S. citizen or other U.S. person (defined below), and
4. The FATCA code(s) entered on this form (if any) indicating that I am exempt from FATCA reporting is correct.

**Certification instructions.** You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See the instructions on page 3.

<b>Sign Here</b>	Signature of U.S. person ▶	Date ▶
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## Sample Contract Page

... given by either party to this Agreement is set forth in this Agreement. Any investment in equipment, vehicles, etc. Contractor desires or deems necessary is the financial responsibility of Contractor. Company has advanced no sums of money to Contractor to underwrite Contractor's business.

I

\_\_\_\_\_  
Contractor's Initials

## Management Contracting Snafus

In the past 18 months, I have personally tried 15 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 15 cases, I learned about many independent contractor-sensitive “snafus” by Circulation Management. The 10 most common issues are as follows:

**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 this contract. One of things I discovered in my preparation is that the written Agreement contained contract language that simply did not apply to the particular contractor in question. 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 using 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 polybags, that had 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" or 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.

**11. Contractor Cannot Read** — In preparing a case, we learned that the contractor could not read; Management was aware of that. That destroyed independent contractor intent.

### Conclusion

I recommend 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.

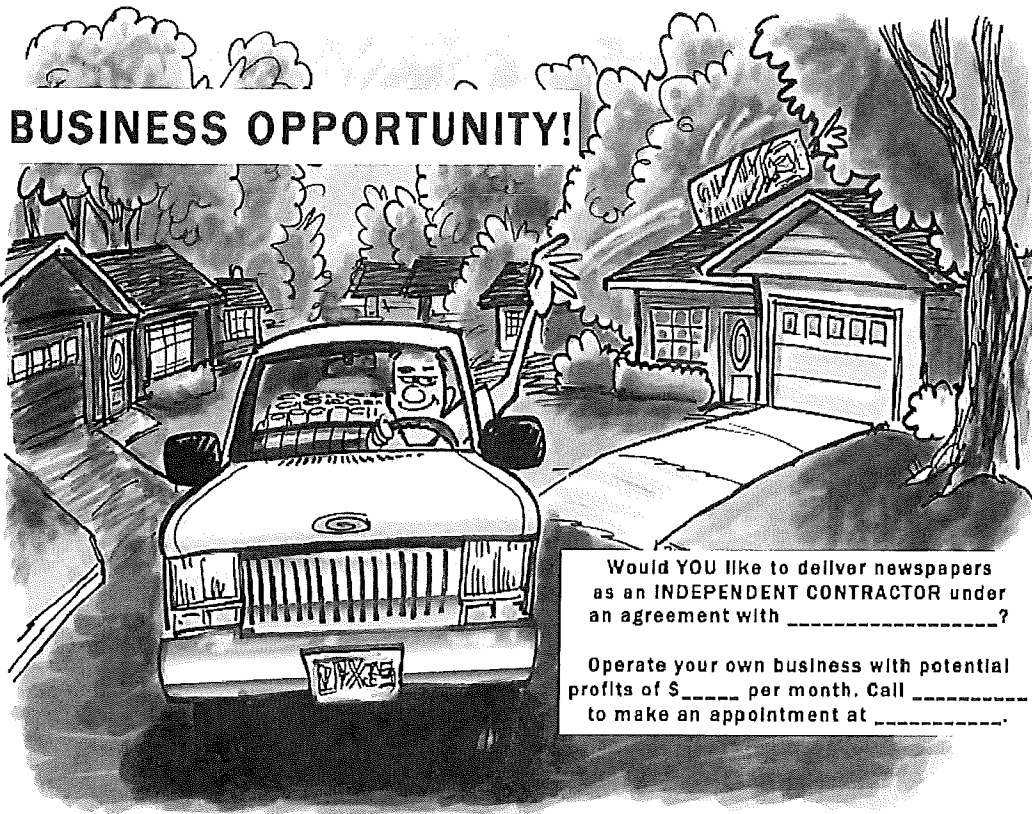
## Sample Carrier Recruitment Ads for Placement in a Newspaper

### **BUSINESS OPPORTUNITY**

WOULD YOU LIKE TO DELIVER NEWSPAPERS  
AS AN INDEPENDENT CONTRACTOR  
UNDER AN AGREEMENT WITH

\_\_\_\_\_?

Operate your own business with potential profits of \_\_\_\_\_ per month.  
Call \_\_\_\_\_ to make an appointment at \_\_\_\_\_.



**BUSINESS OPPORTUNITY!**

Would YOU like to deliver newspapers as an **INDEPENDENT CONTRACTOR** under an agreement with \_\_\_\_\_?

Operate your own business with potential profits of \$\_\_\_\_\_ per month. Call \_\_\_\_\_ to make an appointment at \_\_\_\_\_.

# BUSINESS OPPORTUNITY!



Would YOU like to deliver newspapers as an **INDEPENDENT CONTRACTOR** under an agreement with \_\_\_\_\_?

Operate your own business with potential profits of \$\_\_\_\_ per month. Call \_\_\_\_\_ to make an appointment at \_\_\_\_\_.



## Circulation Management Contracting Checklist

The following factors should be reviewed when contracting with any independent contractor newspaper carrier. After completing the item, the Circulation Manager and prospective contractor involved should place their initials by the numbered item:

1. \_\_\_\_\_ The circulation Management representative reviewed the entire Independent Contractors Distribution Agreement with the prospective contractor and had him/her initial each page.
2. \_\_\_\_\_ Completion of negotiations:
  - The Company's proposed rate was \_\_\_\_\_.
  - The prospective independent contractor made a counter offer or counter offers of \_\_\_\_\_.
3. \_\_\_\_\_ The prospective independent contractor completed IRS form W-9.
4. \_\_\_\_\_ The carrier accident insurance for independent contractors was reviewed with the prospective independent contractor.
  - \_\_\_\_\_ The prospective independent contractor completed the acceptance/rejection card.
  - \_\_\_\_\_ The prospective independent contractor was provided information explaining the coverage.
5. \_\_\_\_\_ The prospective independent contractor provided proof of vehicle insurance.
6. \_\_\_\_\_ The prospective independent contractor provided a photocopy of his/her valid driver's license.
7. \_\_\_\_\_ The prospective independent contractor provided the Company with a copy of his/her most current motor vehicle report revealing his/her driving record.
8. \_\_\_\_\_ After both parties signed the Independent Contractors Distribution Agreement, a photocopy of the signed document was provided to the contractor.
9. \_\_\_\_\_ The prospective independent contractor completed the Bond application.
10. \_\_\_\_\_ The circulation management representative provided a route list to the independent contractor.
  - \_\_\_\_\_ Audio tape
  - \_\_\_\_\_ Written list

Circulation Management Contracting Checklist

- 11. \_\_\_\_\_ The circulation Management representative explained to the prospective independent contractor that he/she has the right to determine the sequence of route delivery.
- 12. \_\_\_\_\_ The prospective contractor reads and understands the English language.  
\_\_\_\_\_ The prospective contractor cannot read English; however (name and address)  
\_\_\_\_\_  
\_\_\_\_\_ acted as a translator.  
\_\_\_\_\_ The prospective contractor cannot read English; however he/she was provided a contract in \_\_\_\_\_ language which he/she can read and understand.
- 13. \_\_\_\_\_ The circulation Management representative reviewed and explained a sample statement provided to contractors.
- 14. \_\_\_\_\_ The circulation Management reviewed and explained an example of daily messages relayed by the Company to the contractor from subscribers.
- 15. \_\_\_\_\_ The circulation Management representative specifically informed prospective contractor that he/she is responsible to pay federal income taxes and that no taxes will be withheld by \_\_\_\_\_.
- 16. \_\_\_\_\_ The circulation Management representative specifically informed the prospective contractor that he/she, as an independent contractor, is not eligible to receive with worker's compensation benefits or unemployment compensation benefits.

By \_\_\_\_\_ Date \_\_\_\_\_  
Contractor

By \_\_\_\_\_ Date \_\_\_\_\_  
[Insert Company Name]