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Is Publicizing Your Legal Violations on Social Media a Good Idea? The Answer May Not Surprise You

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While that self-apparent wisdom could apply to any variety of questionable statements made daily on social media, it became especially relevant earlier this year in connection with a mini-viral job posting.

This past March, an editor from Condé Nast took to Twitter to announce a new opening for an editorial assistant based in New York City. The position would be full time and require the performance of several editorial and content-creation tasks, all of which were described in the editor's tweet chain. Ideally, the candidate would be based in the New York City area, but if not, relocation was possible, though there would be no relocation funds available for the position. Interested candidates were to send in their resumes and some links to prior work. In other words, the process sounded like a standard job posting. Except it wasn't.

The posting, despite the trappings of traditional employment, was for a freelancer. For those familiar with the media landscape or creative industries, "freelancer" is, of course, just another term for an independent contractor. The candidate would not be an employee of the company at all, nor would the candidate be eligible for health insurance, 401(k), paid vacation, or any other benefits.

The tweets went viral, but not in the way the editor hoped. Feeding into an existing frustration with how media companies farm out their content creation, the tweets came under immediate scrutiny when multiple individuals tagged the New York State Department of Labor in their responses. Perhaps sensing its own opportunity to earn publicity, the New York State Department of Labor issued its own tweet, saying it was aware of the job posting and had referred the matter to the Worker Protection team, which was "looking into it." The Condé Nast editor quickly posted another tweet to clarify the nature of the job opportunity. (It turns out he "misspoke," and the opening was, in fact, for a position as a benefits-eligible employee.) The editor's backpedaling was too little too late, as the damage already had been done.

The dangers of misclassifying workers, along with evangelizing the need for documenting job performance issues and having well-written policies in place, rank among the top refrains for employment attorneys. And for good reason—properly classified independent contractors are a rare thing in the wild. Yet, it seems many employers continue to engage individuals as independent contractors, often relying on the advice of well-meaning generalists who instruct "It's OK as long as you don't exercise control over the person."

The reasons employers like to classify workers as independent contractors are apparent. They appear to create flexibility in the workforce and reduce overhead. Yet, the risks shouldn't be ignored when making classification decisions. Aside from the tax liabilities and penalties associated with failing to withhold mandatory payroll taxes, misclassification can raise insurance coverage headaches, such as when an independent contractor files a workers' compensation claim. And when independent contractors are fired and file for unemployment benefits, employers may find themselves facing an intrusive audit.

So why does an issue this important so frequently go wrong? The answer may lie with a common misperception about independent contractors: that the agreement between the employer and individual carries the day. In reality, whether someone is an employee or independent contractor comes down to the day-to-day realities of the relationship, taking into account not only the extent of behavioral and financial control over the individual, but

also permanency and opportunities for profit and loss.

Making matters more complicated is that there is no single test for determining whether someone is an employee versus an independent contractor. The federal Department of Labor has one test, and the IRS has another. So do state worker's compensation laws and agencies that implement unemployment insurance benefits. Under all of these tests, workers are presumed to be employees unless the business that hires them proves otherwise. This is no easy task when some government agencies refuse to acknowledge independent contractor status except for workers who actually operate their own businesses.

So what is an employer to do in the face of these varying laws and continued public scrutiny of misclassification? First and foremost, businesses should examine whether the positions for which they are hiring are truly independent contractors. This is hardly a straightforward analysis. Therefore, businesses should consult with experienced legal counsel who can review the situation, help the business make informed decisions, and help craft documentation and processes to ensure that individuals are properly classified.

And lest anyone think that potential misclassification is limited to the private sector, in late April, *The Daily Beast* reported that presidential candidate Tulsi Gabbard's filings with the Federal Election Commission showed that her campaign had only one employee ... and everyone else was listed as a "consultant." Clearly, she should have called her employment lawyer, which all employers should do if, after reading this article, they are not 100 percent certain that they have classified their workers correctly.

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