Employer risk alert: *You can't 'choose' a 1099, and the 'Boar's Head' decision*

OP-ED

BY RACHEL DEMAREST GOLD

On more than one occasion, an employer has looked me in the eye and told me they "chose" to "put" certain workers on a 1099 instead of a W-2.

I understand the impulse. It can feel like a business decision — a matter of internal classification, paperwork, flexibility. It is not.

The 'Boar's Head' ruling: When 'independent contractor' is just a label

The Appellate Division, Second Department recently reversed a trial court decision that had dismissed Labor Law claims brought against Boar's Head Provisions by three of its distributors. Each of these distributors had operated as an "authorized distributor" of Boar's Head products for years — on paper, an independent business. In practice, the court found, the picture looks considerably different.

The complaint alleges that Boar's Head controls virtually every meaningful aspect of how distributors run their operation: Work hours, pricing, marketing, uniforms, vehicle design, and even the cosmetic presentation of products. Boar's Head required its approval before a distribution route could be sold from one authorized distributor to another, and it prohibited distributors from engaging in any other food-related business.

The trial court dismissed the Labor Law claims on the theory that the distributors were not employees. The Second Department disagreed. Under New York's standard, the critical inquiry is the degree of control the putative employer exercises over the results produced or the means used to achieve those results. Where that control is more than incidental, a question of fact arises — and that question belongs to a jury, not a motion to dismiss.

The standard

How to classify a worker is not a business preference. It is a legal standard established by multiple variables — and in New York, that standard is guarded by worker advocates and aggressively enforced by agencies.

On the federal front, the Department of Labor has proposed reinstating the "two core factor" analysis from its 2021 independent contractor rule, which gives primary weight to two questions: Does the worker control the manner and means of their own work? And does the worker have a meaningful opportunity for profit or loss based on their own initiative or investment? When both factors point the same direction, the answer is usually clear. The problem is that many arrangements that look like independent contracting on paper fail that test when the facts are examined honestly.

In New York, that examination happens at four separate state agencies: the Labor Department, the Department of Tax and Finance, the Division of Human Rights, and the Workers' Compensation Board. Each has its own investigators, its own interpretations, and its own enforcement tools. An employer who prevails under one standard may still face liability under another.

At the federal level, the Department of Labor, the EEOC, and the IRS each have their own framework. The IRS may permit someone to call themselves a business and deduct expenses. The DOL, applying the FLSA's economic reality test, may simultaneously find that same person is entitled to overtime. These agencies do not align, and employers are required to navigate all of them.

The 'Freelance Isn't Free Act': Now statewide

One step towards standardizing these analyses came with New York City's Freelance Isn't Free Act (FIFA). On the books since 2017, it is now a statewide mandate, and it has teeth. The law requires a written contract with any freelancer, covering scope of work and payment schedule, and it gives freelancers many of the same enforcement rights as employees — statutory damages, civil penalties, double damages, injunctive relief, and attorneys' fees.

Any employer engaging an independent contractor is required to have a written agreement in place specifying payment terms and maintaining certain records. If you are working with freelancers or independent contractors anywhere in the state and you do not have written contracts in place, you are already out of compliance.

What employers should do

The basics have not changed, but the risk profile has:

Audit your 1099 relationships. Look at every person you classify as an independent contractor and apply the economic reality test honestly. Who sets their schedule? Who controls how the work gets done? Do they work exclusively for you? Do they have a real opportunity to profit or lose based on their own business decisions? If the answers make you uncomfortable, that discomfort is informative.

Get the contracts in place. The statewide FIFA requirement is not new anymore. Every independent contractor relationship needs a written agreement. It should specify the scope of work, payment terms, and timeline. This is both a legal obligation and a protection for you.

Document the independence. If you have true independent contractors, the record should show it: they set their own hours, they can work for others, they use their own equipment and methods, they negotiate their rates. If the reality does not match the label, the label will not save you.

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