

Independent Contractor or Employee: The Exotic Dancer Cases

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The Beginning

Ray Thompson and his family were longtime owners and operators of food, beverage, and entertainment establishments. One of these, the Valley Gentleman's Club, was a popular entertainment venue featuring exotic dancing. One afternoon, while Ray Thompson was attending to the club's financial records and disbursements, he received a visit from the deputy sheriff. Ray knew the deputy because he had been a frequent visitor to the club for both personal and professional reasons. The deputy handed Mr. Thompson a document and Ray said, "What's this?"

The deputy said, "Ray, I've served Civil Summons and Complaints on you before when people have fallen on your business premise or sued you because they thought they were being 'strong armed' by your bouncers. This one is different. You're being sued by one of your dancers, Tina Brown."

"What!" Ray exclaimed. He continued, "We had to let her go because she was breaking all the club rules. As far as I know, she hasn't danced here for awhile now." The deputy sheepishly shrugged and said "I have to get back to the station, Ray." As he was leaving, the deputy heard Ray say, "This was not what I wanted to hear today. Now I have to drop everything else and see if I can get George Poston to handle this!"

George Poston, attorney at law, had been a sole practitioner specializing in civil litigation for many years. His practice was centered in a small Midwestern city but he represented clients in over forty counties of his state and had tried civil jury trials in the majority of them. Many of his litigation matters involved business clients who were referred to him by their business attorneys. He acquired Ray Thompson through one of these referrals and represented him multiple times in the past. This particular afternoon was an unusually quiet day at the office. The lack of distractions gave him an opportunity to do some research for an ongoing litigation matter, but his efforts were soon suspended by the phone.

"George?"

"Yes."

“This is Ray Thompson. I think I need your help. One of my ex-dancers is suing me”

“Why?” George asked.

“She claims that our club should have treated her as an employee. She says that the club should have paid unemployment taxes and withheld income and social security taxes from her wages. She’s also seeking back wages.”

George had not been involved with internal employment matters of the Valley Gentlemen’s Club in the past, so he asked a clarifying question, “The club treated her as an independent contractor. Is that correct?”

“Yes,” said Ray. “Our club classified all of the dancers that way. That’s what worried me most about this lawsuit. The amounts this dancer claimed aren’t huge, but, if the word gets around and we end up on the losing end of this thing, we could have exposure to more claims.”

“OK. We need to sit down and discuss this thoroughly. I also need to look over any employment contracts or other pertinent documents. Next Monday is a fairly light day for me. How does Monday at 1:00 p.m. at my office sound? Bring any paperwork and other information concerning this dancer with you,” George told him.

“That’s a good time for me, too. See you then,” said Ray.

Before the appointment, George decided to research the legal issues of employee or independent contractor classification and also searched for background information helpful for applying the issues to exotic dancing clubs. He discovered that the treatment of performers at these clubs was an issue of contention between the clubs, performers, and governmental agencies. Gentlemen’s clubs had been frequent targets of IRS audits and of litigation between the performers and club management. Some clubs preferred to treat their performers as employees just to minimize the risk of audits and claims but many clubs continued to treat their performers as independent contractors.

Club owners, performers, and the government all had an interest in the issue of whether a working person was classified as an employee or independent contractor. Owners preferred to classify these performers as independent contractors because the owners would not be responsible for social security and other payroll taxes, withholding of income taxes, and workman’s compensation payments under that classification. Also, independent contractors were excluded from employee benefit plans and from the consideration of whether or not those plans discriminated in favor of highly compensated employees. Under independent contractor status, performers were required to pay all (instead of half) of their social security taxes and were responsible for any other payroll taxes or workman’s compensation insurance as self-employed persons. Although self-employed persons were allowed greater deductions under the tax law, the burdens of record keeping were significantly greater for them. Finally, the governmental taxing authorities preferred employee classification because that classification placed the primary burdens of compliance on fewer individuals and entities (the employers), reduced the risk of noncompliance and nonpayment, and reduced the strain on the enforcement resources.

The Initial Appointment

During the Monday appointment, George interviewed Ray about the situation and reviewed the contract between the former dancer and the club. George had not been involved with the drafting of the club's existing working agreement with its dancers. From this initial review of the circumstances, the contract, and the law, George drafted an answer to the plaintiff's complaint.

The terms of the working agreement between the former dancer and the club are summarized in Table A at the conclusion of the case narrative. Many of the terms of the contract dealt with rules of conduct during performance nights at the club. Some of these rules were designed to comply with public ordinances and standards of decency (for example, restrictions to partial nudity, distance and no-touching rules, and the rule prohibiting non-performers from entering dressing rooms). Others were drafted from concerns over the personal safety of dancers and other club personnel (for example, rules regarding distance of dancers from customers, the requirement for escorts upon leaving the club, and the prohibition against more than one dancer performing on the main stage at a time). There were also limits set on dancers' drinking to avoid the hazards of dancer intoxication. Some rules were designed to minimize conflicts between dancers or between the dancers and other club personnel (like DJs).

The dancer was required to affirm that the dancer was an independent contractor and responsible for all income and employment taxes and insurance payments. Although dancers could choose performance days in consultation with the club's management, once a dancer was scheduled to perform, the dancer was subject to fairly strict time commitments on those nights. Arriving late on scheduled performance nights could subject the dancer to the loss of ability to maximize revenue by performing private dances.

Ray told George that the suing dancer's name was Tina Brown. She had performed at his club part-time over a three year period until the club's manager told her that she no longer wanted her to perform at the venue due to a number of no-shows on scheduled performance days and some allegations of intoxication and disruptive behavior. When Tina first applied to dance at the club, she was told that all dancers were treated as independent contractors. Ray told her that, to his knowledge, independent contractor treatment was customary in the industry. She would not be paid a wage and her earnings would come strictly in the form of charges for private dances and tips received from customers.

Ray preferred the independent contractor treatment for a number of business reasons. First, he had the typical preference to minimize the club's liability for employment taxes, payroll taxes, and workman's compensation payments and insurance. Perhaps more importantly, he felt the typical tenure of dancers in the industry did not conform to normal employment status and the burdens of the required record keeping and the potential for legal exposure were not warranted under the circumstances. The tenure of performers could sometimes be brief and erratic. Often performers were truly short-termers who only wanted to earn fast money over a brief period. Sometimes performers would want to work many nights over a few weeks and hardly at all for a period afterward. For most of the performers, this was a "moonlighting" way of earning money

and dancing often took a backseat to other priorities in their lives. Frequently dancers failed to show on scheduled days. Finally, despite the club's efforts to reduce violations of morals codes and ordinances, occasionally there were some "bad apples" crossing the line of legality and the club preferred to limit its exposure by not being the employer of one of them.

The Discovery Process

After George drafted and filed a Response to the Plaintiff's Complaint, the discovery process began to gather evidence relevant to the case. Interrogatories were exchanged between parties and depositions of significant witnesses were taken.

Testimony of the Plaintiff Tina Brown

Tina Brown was an experienced exotic dancer having worked in that business off and on for about five years prior to the lawsuit. When she approached the management of the Valley Gentlemen's Club to inquire about dancing there, she was shown the standard agreement between the club and its dancers (summarized as Table A) and signed it. By the terms of the agreement, she was aware that she would not receive common employment benefits like regular wages, health insurance, life insurance, or paid vacation. She was also aware that she would be responsible for paying any income taxes, payroll taxes, or any insurance related to disability. During her deposition testimony, she stated that she signed this agreement at the time because she needed the work and had no other choice if she wanted to perform at the venue. The terms of the contract were different from the other clubs where she had performed as an employee.

Tina Brown described the rules and working conditions during her tenure at the Valley Gentlemen's Club. The dancers were free to pick the preferred performance days from days available. Normally dancers called the management and requested certain days. The dancer was scheduled if those days were available. The dancer was required to arrive by 5:00 p.m.

The club attempted to control the dressing and wardrobe choices of the dancer. Some of those requirements were based upon city ordinance restrictions. The club normally preferred the dancers to wear ball gowns as outer garments. Additionally, the club ordered the dancers to change at least twice during the night. The club had no policy on stage names, so using those was at the dancer's discretion.

Tina Brown estimated that she worked at least three nights a week at the club during her tenure. She believed she averaged at least forty hours a week during some weeks. She also testified that she had to complete a work schedule with some weeks requiring a minimum of 32 hours. She stated that she probably averaged between \$300 and \$400 per week from her performances at the club. She was not paid an hourly, daily, or weekly wage. Her earnings came in the form of fees for private dances and tips.

Although she signed the agreement acknowledging that she was an independent contractor, Tina believed she was in fact an employee and believed she should have been entitled to the normal employment benefits including a minimum hourly wage for the time spent at the club. The dancer believed she was doing the job of an employee, brought in customers, and worked under the rules of the club. She worked under club-mandated requirements regarding when to arrive, when to leave, when to be on stage, when to participate in dancing reviews (every two hours), what type of music could be used, and limitations upon what she could drink when not dancing. She did acknowledge that, unlike employees, she had to exit the club by the normal closing time. She did not have to clean the club in general like other employees although she was required to pick up her own items in the dressing room.

She believed that she was fired from her job like some other club employees during her time there. However, she did not file for unemployment benefits after her discharge from the club.

Tina Brown claimed the funds received from the club as self-employment income on her tax return. She categorized the income this way because she did not have any W2 statements from the club and felt she had no other alternative. According to her tax return for the subject year of the litigation, self-employment business income was \$16,000. All of it came from the Valley Gentlemen's Club.

Testimony of Gloria Hoffman

Gloria Hoffman was the manager of the Valley Gentleman's Club. She had worked at the club for twenty-three years. She began her tenure as a bartender.

Gloria met with Tina when she applied to dance at the club. Gloria had known Tina Brown before that meeting. She reviewed and explained the working agreement to her. Tina appeared to understand the contract, did not raise any objections at the time, and willingly signed the agreement.

Gloria's testimony about the amount of time Tina performed at the club contradicted Tina's. According to Gloria, Tina danced at the club over parts of three years. She danced 74 days in the first year and 108 days in the second (the subject year of the litigation). In the final year before Tina was dismissed as a performer, she danced 39 days up until mid-June. Gloria testified that the club did not have a "work schedule" for dancers although it had to maintain a performance schedule for them. Getting on the schedule, however, was mostly left to the initiative of individual dancers.

Gloria confirmed that scheduled dancers were requested to remain on the premises for approximately eight hours and to perform in reviews on the main stage. During that eight-hour period, the club did not control the amount of time they performed private dances. Tina, like other dancers, decided when to take breaks and frequently sat down, ate, and consumed alcohol.

The manager provided additional comments on some of the "rules" in the contract. The prohibition against drinks on stage was designed to avoid accidents from spilled drinks. The rule

against smoking on stage reduced the possibility of a dancer being burnt or soiled from laying on a hot ash or cigarette butt. The requirements to participate in the regular main stage reviews helped to promote all of the dancers by giving them regular visibility to customers. Numerous rules were designed to protect the dancers, allow them to maintain control in their performances, and reduce running afoul of city ordinances and decency laws. Gloria stated that all dancers were given the opportunity to perform in a lawful and protected manner but they were reminded that violations of the law and risks to their safety and others would not be tolerated.

Resolution of the Case

After concluding discovery, George Poston drafted a Motion for Summary Judgment urging dismissal of this case without further proceedings on the grounds that the claim lacked merit. The Court disagreed with the motion, stating that there were potentially meritorious issues of law and fact, and allowed the case to proceed. Faced with the hazards of litigation and the relatively modest amount of Tina Brown's claim for damages, George persuaded his client that it might be advisable to settle the matter quietly. Ray Thompson consented and the parties agreed to a settlement payment in exchange for dismissal of the suit. George then told Ray that the club's top priority should be to design a new hiring contract between the club and its performers that would strengthen the presumption of the dancers' independent contractor status.

Epilogue

After settling the claim of Tina Brown, George Poston completed additional research of the employee versus independent contractor issue and discovered various performer contracting techniques used in the industry. George decided to use a working agreement classifying the club as a lessor of performance facilities and the performer as the lessee. Under this agreement, the performer was entitled to all fees charged for dances and tips received from customers. The performer then had to remit a stated rental fee to the club for the use of its facilities. The new working agreement also revised and clarified certain other terms of the working relationship between the club and its performers. The terms of the second working agreement are summarized in Table B appearing at the end of this case.

The old working contracts were phased-out and the new contract was offered to all performers. At the time of reviewing the contract with the club manager, the performer was given the option of choosing employee treatment. If the performer chose employee treatment, the performer was entitled to receive an hourly minimum wage plus tips. All other amounts were to be turned over to the club management. The performer would have to declare wages and tips and the employer would withhold taxes and make other required employment tax payments.

George Poston and the club's management believed that the second working agreement would provide a firmer foundation to the independent contractor treatment of dancers. Nevertheless, several dancers choosing independent contractor status under the second contract (Table B) sued the club for back wages and tax payments. After a brief period of discovery, George moved for a dismissal of one of the cases based on lack of merit. This time George and the Valley Gentlemen's Club prevailed and a motion for summary judgment was granted. As a result of the

dismissal, the remaining performers dropped their claims. All of the club's performers remained independent contractors and no further lawsuits were filed.

TABLE A – SUMMARY OF INITIAL WORKING CONTRACT BETWEEN THE CLUB AND ITS PERFORMERS

I) Performance Times

- a. Dancers were permitted to schedule their nights in consultation with the club managers.
- b. Dancers were required to be at the club and ready to perform by 5:00 PM unless they had called in with a valid excuse for lateness.
- c. Dancers were required to remain at the club until 12:45 AM and to participate in reviews and a grand-finale at 12:00 AM. Dancers were to be available for various types of dances (including private and special dances) during these hours.
- d. Dancers were not permitted to leave before 12:45 on performance nights unless special permission is obtained from the club manager.

II) Dance Music and Duration of Stage Dances

- a. All music was to be provided by the club's DJs unless the dancer obtained advanced permission to use her own music.
- b. Dance numbers were to average about four minutes each.
- c. Dancers were required to tip the DJs a minimum of \$5 per night.

III) Private and Special Dances for Customers

- a. Dancers were to charge standard fees for designated private and special dances requested by customers. Customers were able to pay more than the standard fee but a dancer could not request more.
- b. Dancers were not permitted to perform private and special dances for customers unless they had first performed on the main stage, and any dancer failing to participate in the 6 PM main stage dance review would lose the opportunity to perform private and special dances for the night.

IV) Requirements of Conduct During the Performance of Dances and While Off-Stage

- A. No smoking or drinking of alcoholic beverages were permitted on stage.
- B. Two dancers could not appear on the main stage at one time.
- C. Dancers were not permitted to drink shots, 2 for 1 drinks, or specials on performance nights.
- D. Dancers were to remain covered between dances.
- E. Dancers were required to wear shoes at all times in the club.
- F. Dancers could not lean into customers or touch them inappropriately during private dances.
- G. Dancers were not permitted to use breasts or buttocks to accept tips from customers.
- H. When performing private or special dances, dancers were to keep both feet on the floor.

Dancers were not permitted to climb on top of tables or chairs.

I. Dancers were to remain at least one foot away from customers.

J. Customers were not permitted to touch dancers. Any customer breaking that rule was to be warned once by dancer and to be removed from the club for a second violation.

K. Dancers were only permitted to use dressing rooms for changing. No guests were allowed in dressing rooms.

V) Other Requirements of Dancer Conduct

A. As independent contractors, dancers were required to exit the club by the normal closing time (1:00 AM).

B. Dancers were not permitted to leave the club without an escort.

C. Dancers were not permitted to use or be under the influence of drugs on the club premises.

VI) Independent Contractor Assumption

The dancers were required to affirm that they were independent contractors and that they were responsible for all social security taxes, income taxes, state entertainer's taxes, and workman's compensation payments. The dancers were also required to forfeit any claims against the club for injuries or damage to equipment.

TABLE B – SUMMARY OF SECOND CONTRACT BETWEEN THE CLUB AND ITS PERFORMERS

The title of the contract was "Dance Performance Lease" and it was an agreement between the club and a performer. The club agreed to provide all of the facilities for the performer in exchange for a rental fee.

I) Provisions Relating to Performer's Right of Control

a. Performer had the exclusive right to select dance days in conjunction with the club's available spaces. Requests for performance days were to be given one week in advance of performance.

Once days were requested and given to a performer, performer had an obligation to perform. Failure to do so could be considered a material breach (see section below).

b. The lease agreement explicitly provided that none of its terms restricted a performer's freedom to dance at other clubs.

c. The club would have no control or direction of performer's dance routines, costumes, props, or music other than the restrictions noted in an addendum to the lease (concerning prohibited behavior and touching).

d. Performer's rights to dance were not transferrable.

II) Provisions Relating to Performer's Obligations

a. Performance shifts were to run 7.5 hours on weekdays (5:00 PM to 12:45 AM) and 8.5 hours on weekends (5:00 PM to 1:45 AM).

b. Performer was to supply the club with a copy of an assumed name registration if a stage name was used.

- c. Performer had the obligation to maintain all licenses or permits that may be required for her profession.
- d. Performer agreed to perform semi-nude dancing and give her best efforts in dance performances.
- e. Performer agreed to reasonable and courteous behavior with staff and customers.
- f. The lease contained a provision prohibiting possession, or being under the influence, of illegal drugs.
- g. Performer warranted that she would not violate any federal, state, or local laws or ordinances and that she would comply with the described restrictions imposed on conduct during private dances.
- h. Performer warranted that she would not engage in sexual activities of any nature during her club performances nor allow customers to touch designated portions of her anatomy.
- i. Performer was required to maintain accurate records of earnings as required by governmental taxing authorities.
- j. Performer was required to pay for all food and beverages consumed and was not entitled to discounts.

III) Performer's Expected Earnings

- a. The performer's earnings were composed of private dance fees and tips less the rental payments to the club. Private dance fees were set in amount (\$10 per private dance). The customer could pay more but the performer could not ask request more.
- b. The club represented to the performer that she should be able to earn, exclusive of tips, a minimum of \$206 in excess of the rental payment charged for each 40-hour period. Performer was required to inform the club if she did not achieve that earnings target for the 40-hour period. This provision did not obligate the club to provide the performer with a guaranteed payment. The provision was designed to give the club on notice of possible conditions for the performer to discontinue the relationship.

IV) Material Breaches of Lease Agreement

The following were considered material breaches of the lease agreement:

- a. Engaging in any unlawful conduct;
- b. Engaging in solicitation or sexual conduct while on the premises;
- c. Possession, or being under the influence, of illegal drugs or intoxication on the premises;
- d. Failure to perform on scheduled days on more than two calendar days in any month;
- e. Engaging in disruptive behavior on the premises;
- f. Failure to pay rent payments when due.

V) Termination Provisions

- a. Either party could terminate upon 30 days notice to the other party. In case of a material breach, the non-breaching party could terminate the agreement with a 24 hour notice to the other party.
- b. The performer could immediately terminate the lease (upon notice) if the performer's earnings fell below the minimum expected under lease contract described in III-b above.

VI) Option For Employee Treatment

The lease agreement offered the performer the option of being treated as an employee rather than signing the lease agreement. The performer would be paid an hourly minimum wage in addition to tips from customers. The performer would have to declare all tips. The club would withhold taxes and social security and pay its share of required payroll taxes and workmen's compensation payments.

In the event that performer signing lease agreement subsequently made a claim against the club for back payments as an employee, performer would have the obligation to return any funds earned by the performer in excess of what the performer earned under the lease agreement.

Appendix A – IRS Factors for Classifying Employee or Independent Contractor Status

The Internal Revenue Service's criteria for evaluating whether workers are employees or independent contractors are detailed in Revenue Ruling 87-41 (1987). The Ruling gathers the various factors that have been used in federal court litigation over the years into this document. The factors are summarized below.

Factors:

1. *Instructions.* If the hiring party has the right to require the worker to comply with instructions for the performance of the tasks, the worker is normally an employee. The right does not have to be exercised. Generally, instructions regarding compliance with government laws and regulations are given little weight.
2. *Training.* If the hiring party provides training to the worker, the worker is normally an employee.
3. *Integration into employer's business operations.* If the worker's services are an integral part of the employer's business success, the employer is more likely to exercise control and the worker is more likely to be an employee.
4. *Services Rendered Personally.* If the services must be performed by the worker personally and cannot be substituted, the hiring party is exerting control of the methods of performance and the hired party is more like an employee than an independent contractor.
5. *Hiring, Supervising, and Paying Assistants.* If the hiring party provides and pays for assistants (and their working materials) for the benefit of the worker, the worker is more likely to be an employee.
6. *Continuing Relationship.* A continuing relationship between the hiring party and the worker indicates an employment relationship. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

7. *Set Hours of Work.* The establishment of set hours of work by the hiring party indicates an employment relationship.
8. *Full Time Required.* The requirement that the worker devote substantially full time to the hiring party's business indicates an employment relationship because this requirement restricts the worker from performing services in other endeavors or for other employers.
9. *Work Must be Performed on Employer's Premises.* If the worker must perform the work on the hiring party's premises, this requirement suggests control over the worker. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises.
10. *Order or Sequence Set.* If designated services must be performed in an order determined by the hiring party, this requirement suggests that the worker is not free to follow the worker's own pattern of work and suggests an employment relationship.
11. *Oral or Written Reports.* A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control and an employment relationship.
12. *Payment by Hour, Week, Month.* Payment by the hour, week, or month generally suggests an employer-employee relationship unless payment at regular intervals instead of in a lump sum is done for convenience or cash flow purposes. Payment based on straight commission generally indicates an independent contractor status.
13. *Payment of Business and/or Traveling Expenses.* Payment of the worker's business or travelling expenses by the hiring party generally indicates an employment relationship.
14. *Furnishing of Tools and Materials.* Furnishing tools or materials by the hiring party favors employment classification.
15. *Significant Investment.* If the worker invests in facilities required in the performance of the services, this factor favors an independent contractor classification. If there is no investment in such facilities, the lack of investment indicates dependence upon the hiring party and an employment relationship.
16. *Realization of Profit or Loss.* A worker who can realize a profit or suffer a loss from the services (in addition to the profit or loss ordinarily realized by the hiring party's employees) is generally an independent contractor, but the worker who cannot is an employee. Risk of loss would typically come from required investments or liability for payments to others from the worker. The risk that a worker be unpaid for his or her services is common to both employees and independent contractors so this risk does not distinguish between them.
17. *Working for More Than One Firm at a Time.* If a worker performs services for multiple unrelated persons or firms, that fact points towards independent contractor status.

18. *Making Service Available to General Public.* If a worker makes his or her services available to the general public on a regular or consistent basis, the worker is likely an independent contractor.

19. *Right to Discharge.* The right to discharge a worker is a factor indicating that the worker is an employee. Generally, an independent contractor cannot be fired if the independent contractor's performance meets contract specifications.

20. *Worker's Right to Terminate.* If the worker has the right to end the working relationship without incurring liability, this right indicates an employment relationship.

Conceptually, these twenty factors may be classified into three categories of Behavioral Control, Financial Control, and Type of Relationship (RIA, 2012). Behavioral Control includes the factors detailing whether the hiring party has the right to direct and control the way the work is performed. Financial Control indicates to what extent the hiring party controls the amount of profit or loss the worker may experience. Significant investments, payment of business expenses, and limits on the potential profits of the worker suggests that the hiring party exerts financial control and is an employer. Financial control would also include more or less exclusive control of the means and timing of payment by the hiring party. Type of Relationship includes factors addressing the exclusivity of this relationship (Is the worker free to perform these services for others or may a worker substitute other persons to perform these services?), the extent to which the hiring party provides the worker with benefits normally given to employees, and the extent to which the services performed by the worker are an integral part of the success of the hiring party's business.

Appendix B – Common Law Authorities Controlling the Issue of Worker Classification

You may locate these cases by performing an internet search (e.g. Google). Search the case name (e.g., *Jenson v. Department of Economic Security*), the citation (e.g., 617 N.W.2d 627 (Minn. App. 2000)) or both. A review of the cases, for the reasons it is noted below, you may find important. Remember, it is not necessarily the law of the land unless the United State Supreme Court so states. It is the “Final Arbiter” of the law. Other courts at the state and federal level may agree or disagree.

The Federal Fair Labor Standards Act has been followed by most, if not all, of the states. While court rationales in deciding whether one is an employee or independent contractor are somewhat different, Federal and State Appellate courts agree that there is at least a five part test. The Minnesota Court of Appeals has set out that five-part test in *Jenson v. Department of Economic Security* (2000). In *Jenson*, the appellate court adopted the typical five part test in determining the status of individuals as employees or independent contractors: "(1) The right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge.

There are some comments by appellate courts that are helpful to applying the five factor test:

1. If you conclude that the “label” of “independent contractor” in the contract circumvents your need to further complete the task, consider the United States Supreme Court’s decision in *Rutherford v. McComb* (1947) where the nation’s highest court stated (at pg. 129) that giving an employment arrangement an independent contractor label does not remove the worker from the protection of the Federal Fair Labor Standards Act.
2. If you conclude that a factor in the five-factor test does not favor either party, that part should be disregarded in your analysis of who wins. In *Eisenberg v. Advance* (2000), the Federal Appellate Court stated (at pg. 114) that factors that are equally irrelevant, or of indeterminate weight and not favoring either party, should be disregarded.
3. On the other hand, do not assume that certain facts outweigh others so as to conclude one of the parts must fall to a particular party. For example, a club’s attempt to de-emphasize its control by arguing the rules were instituted for the protection of the dancers and to keep the club within legal regulations has been held, standing alone, to not make the right of control factor favor the club (*Reich v. Circle C*, 1993).
4. You may consider, although it is not controlling, the question of remuneration. Some courts have focused on this question and stated it is dispositive of the issue whether someone is an employee or independent contractor (*Graves v. Women's*, 1990). However, other courts have determined it is just one of the factors in mode of payment.

In reaching a classification judgment, reasoning here could be deductive (the logical relationship involving a major premises, minor premise and conclusion), linear (the thought process proceeds from one point to another, with the final point being the conclusion) and/or analogist (comparing the facts of this case with the facts of previous cases and where the patterns are similar, apply the

court rules of the prior case to a current fact pattern). In reaching a conclusion, consider the factors individually. However, keep in mind the United States Supreme Court stated in *Rutherford v. McComb* (1947) at pg. 730 "(T)he determination of the (employment) relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity."

References

Eisenberg v. Advance Relocation & Storage, 237 F.3d 111 (2d Cir. 2000).

Graves v. Women's Professional Rodeo Association, 907 F.2d 71, 74 (8th Cir. 1990).

Jenson v. Department of Economic Security, 617 N.W.2d 627 (Minn. App. 2000).

Reich v. Circle C Investments, Inc., 998 F.2d 324 (5th Cir. 1993).

Revenue Ruling 87-41 (1987-1 CB 296).

RIA Federal Tax Handbook (2012), Paragraph 3003.

Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).