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Employers and Workers Clash in Court Over 'Contractor' Label

Disputes Arise Over Pay and Benefits; IRS Plans to Launch Closer Look at Classifications

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By CARI TUNA

As a cable-television installer in Massachusetts, Fritz Elienberg drove a van and wore a shirt emblazoned with "Comcast." He installed equipment from Comcast Corp., and customers paid the cable provider for his work.

Mr. Elienberg wasn't a Comcast employee, but a so-called independent contractor working for a separate company. This month, Mr. Elienberg sued both companies, for allegedly depriving him and other contractors of overtime pay and benefits by not considering them employees.

The case highlights a perennial issue for employers that is gaining new prominence during the recession. Lawyers say employers are trying to avoid hiring full-time employees by tapping contractors, as workers seeking better pay and benefits turn to the courts. Employment law firm Ogletree, Deakins, Nash, Smoak & Stewart PC has seen a 13% rise in misclassification

claims this year, compared with the same period in 2008, attorneys estimate.

Meanwhile, revenue-strapped government agencies are cracking down, seeking unpaid taxes. Last month, the Internal Revenue Service said it will audit 6,000 random U.S. employers beginning in February, marking its first attempt since 1984 to quantify how many employers misclassify workers.



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Fritz Elienberg

Cable-TV installer Fritz Elienberg claims Comcast deprived contractors of overtime pay and benefits by not classifying them as employees.

covered by minimum-wage, overtime and antidiscrimination laws, and employers don't have to pay unemployment insurance, workers' compensation or Social Security taxes for them.

No one knows how many workers are erroneously labeled contractors. The IRS estimated that in 1984 employers had misclassified 3.4 million workers, depriving the government of \$1.6 billion in tax revenue that year.

The classification rules are complex, and sometimes vary among agencies, but typically boil down to the employer's control over how and when an individual works. The IRS has no "bright line" test, but rules on a case-by-case basis using a three-part analysis.

Employee, or Contractor?

The Internal Revenue Service considers three types of factors to determine if a worker is an employee or independent contractor:

Behavioral: Does the employer dictate how the work is done?

Financial: Does the employer provide tools?

"We've seen a significant uptick in enforcement actions" reported by clients, says David Islinger, a partner at Jackson Lewis LLP, a law firm that represents employers. He says some employers view hiring contractors as a "quick fix" and "don't appreciate the risks" associated with the practice.

From coal miners in the 1940s to Microsoft Corp. programmers in the 1990s and FedEx Corp. truck drivers in recent years, employers and workers have long sparred over the distinction. Contractors aren't

Lawmakers and courts are also weighing in. Massachusetts is a particular hotbed of activity.

Last year, lawmakers there stiffened penalties for employers that violate wage-and-hour laws. In August, the state's

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Does it pay by the job or the hour?

Relationship: Is the work 'key' to the employer's business?

Source: *Internal Revenue Service*

highest court ruled that workers can seek damages from employers who misclassify them as independent contractors, even if they would have been paid less as employees.

Those developments have helped fuel lawsuits over misclassification. Mr. Elienberg, the former Comcast contractor, filed a similar class-action suit against cable provider [RCN Corp.](#) in June.

The companies are "treating us as second-class citizens," says Mr. Elienberg, 48 years old. "We get absolutely nothing. No overtime. ...If we get hurt on the job, we're on our own."

Mr. Elienberg says the company working with Comcast fired him after managers found out about the RCN suit and he questioned his employment status. He remains unemployed.

Comcast spokesman John Demming says Mr. Elienberg was never a Comcast employee, adding that both his shirt and his van identified him as a Comcast contractor. "We strongly disagree with the suit and will defend ourselves vigorously," Mr. Demming says. "We require all of the companies we contract with to comply with all state and federal laws."

RCN declined to comment.

Class-action suits brought by exotic dancers in Massachusetts demonstrate how the recession is forcing the issue. Four current and former dancers at Ten's Show Club in Salisbury, Mass., are suing club owners for allegedly misclassifying them and dozens of other dancers as independent contractors, depriving them of wages and benefits.

Before the recession, the dancers could earn hundreds of dollars in tips per night, so they didn't object to not receiving an hourly wage, and paying a small nightly "house fee" to dance, says Tod Cochran, a Boston lawyer representing the dancers. But business—and tips—are down, and managers have raised the house fee to as much as \$60 per night, he says.

Mr. Cochran says the women were encouraged by a state court that earlier this year ruled in favor of about 70 dancers classified as contractors at a different club, who could each receive thousands of dollars in damages.

An attorney representing Ten's Show Club owner Mark Filtranti declined to comment. Telephone calls to the club weren't returned.

Write to Cari Tuna at cari.tuna@wsj.com

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