

Independent Contractor

VS.

Employee

WHAT'S BEST FOR ME?

By Ted Curtis

A few years ago, Bill Snell found himself with a little problem. Even if the newly elected president of the Texas-based Bay Area Soccer Officials Association wanted to put language in his organization's bylaws stating that its officials were independent contractors, he couldn't.

"We couldn't even *find* the constitution," laughs Snell. "But we knew that when we rewrote the bylaws, we had better specify that our officials were independent contractors." The constitution never did pop up, but when the association eventually wrote a new one, they made darn sure the independent contractor question was clarified.

Why did that officials association care so much about the seemingly dry legal question of whether its referees were independent contractors or employees? For the same reasons that you should: Because that issue goes to some of the most critical areas of your officiating existence — individual business freedom, onfield independence and big, big bucks.

As you probably already know by looking at the paychecks from your regular nine-to-five job, an employer generally is responsible for a host of financial obligations to its employees, from withholding income taxes to covering employees with workers' compensation benefits. If those workers are independent contractors, the employer is off the hook for those financial requirements.

From an officiating standpoint, that distinction poses important questions. Must a league pay costly unemployment insurance for the basketball referees it hires? Must a community parks department withhold social security taxes from umpires who work summer softball games? And the question that stared Snell in the face when he went to write his association's bylaws: Must an officials association — which, in some

instances, also might be on the hook for those expenses — cover its members with workers' compensation protection? And what would be the financial fate of officials caught in the middle of the issue?

DRAWING THE LINE

First, let's examine how to determine if a worker is considered an independent contractor or an employee. The key lies in the degree of control exercised by a hiring entity over a worker's job.

"A plumber is a good example of an independent contractor," explains Don Collins, an attorney and referee in California and author of a recent NASO Special Report on the issue. "If you call him to come fix the sink, you can't really control how he is going to perform that task. He may use a plunger or a chemical — it is up to the plumber. On the other hand, look at a guy who works at Burger King. The company controls every detail by which that guy performs his job, from when he will arrive at work to how he will make the burger. He's an employee. Those are probably the two extremes."

Where do officials fit between those two ends of the spectrum? The Internal Revenue Service (IRS) hasn't exactly jumped at the chance to answer that question outright. The IRS has published guidelines applicable to all independent contractors, a comprehensive list of nearly two dozen criteria examining control over a worker's behavior, finances and overall employment relationship (see "Determining Your Status" sidebar). And in 1967, the IRS released a somewhat helpful Revenue Ruling — a case-specific decision that offers only nonbinding guidance — stating that the members of a group of high school officials were independent contractors even though their association took actions usually associated with employers, such as assigning officials to particular games and providing job training.

The result of those IRS pronouncements? A most slippery slope for officials to attempt to negotiate.

"It's a tough thing to determine," admits New Jersey attorney Mel Narol, one of the foremost authorities on sports officiating law and a special advisor to NASO. "The more that the hiring entity exercises the factors of control that the IRS takes into consideration, the more the official begins to look like an employee."

At lower levels of athletic competition, such as youth and recreational sports, however, it appears that officials may be safe in assuming that they are independent contractors. While hiring entities do exercise some control over officials' jobs, nearly all appeals court decisions on the issue state that this control — such as requiring official uniforms and specifying pregame arrival times — is not enough to cross the independent contractor/employee line at that lower level of competition.

"The key here is that officials at that level basically can control their own destiny," explains Steven Ellinger, an attorney and basketball official in Texas. "They can pick the games that they would like to work, the dates they will work, where they will go to work, even the officials that they may — or may not — want to work with."

That degree of freedom naturally changes depending on how high the official goes up the competitive ladder. Referees with clear employee status are those in the major professional leagues — NBA, NHL, NFL and Major League Baseball. Officials in those four leagues are unionized and are technically employees of their respective leagues.

But what about the overwhelming majority of officials who find themselves between those two extremes, the tens of thousands of officials who fall somewhere between the once-per-month coed youth soccer official and the Super Bowl referee?



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WHAT CAN YOU DO?

1 Take a close look at the laws in your state, understanding that just because a neighboring state has passed a sports officiating independent contractor law does not necessarily mean that your local legislature will jump on the issue and pass similar legislation. "There are just too many states and too many people with different political agendas to accurately predict what legislators will or will not do," offers attorney Don Collins.

2 Specify in your association bylaws that your officials are either independent contractors or employees. "If you put something like that right in your bylaws," offers Bay Area Soccer Officials Association president Bill Snell, "no one can come later and say that he never knew that was the way it was going to be handled. You will always have it in writing."

3 If your officials association's members wish to be considered independent contractors, be sure that, at the beginning of every new season or before the official ever works a single game, each official signs a document stating that the official understands that (a) he or she is an independent contractor, and (b) the officials association will not be responsible for employment tax withholding, unemployment insurance, social security taxes, workers' compensation or similar employee-like benefits.

4 To lean the scales toward independent contractor status, have the officials association pay you directly, rather than having your paychecks come from the hiring entity. It is not a foolproof guarantee of independent contractor status, but it is a rather easy way to help you swing the issue toward the independent contractor side (See "Law," p. 26 for further information on that point).

5 If you are an independent contractor, be sure to protect yourself with liability insurance from NASO, NFOA, ASA or other organizations. "The biggest problem that I see is that a lot of guys, particularly those who get involved at the lowest levels of competition, think that they don't need to get this coverage," says Collins. "They figure, 'Oh, I'm just out here doing 80 little fifth-grade games over the course of a 10-week season. What do I need to bother with this stuff?' Well, those are the guys who may need liability insurance the most because they are at the center for many of the liability issues that may arise."

FROM ON COURT TO IN COURT

In some cases, decisions in courts around the country have been of some help in answering that difficult question. In others, rulings have nudged state legislators to take the job into their own hands and answer it definitively.

The only federal decision on the issue was the 1987 case of *Collegiate Basketball Officials Association v. National Labor Relations Board*, decided by the Philadelphia-based U.S. Court of Appeals for the Third Circuit. The court ruled that college officials could not become unionized — a right reserved for employees — because being required to wear uniforms and appear to work at specified times were not sufficient manners of control to turn them from independent contractors to employees.

On the state front, courts in Maryland, New York, Pennsylvania and South Carolina have ruled specifically that sports officials are independent contractors. A New Jersey court implied as much in a 1977 ruling, and a Colorado appeals court upheld an association's ability to put independent contractor language in waiver forms signed by its member officials.

However, legally bound only by their own state tax laws — not by IRS rulings or the decisions of other state courts — a number of states also have found officials to be employees. In California, the state's Employment Development Department hit a Santa Clara-based officials association with a \$50,000 bill for its member officials' back taxes, covering unemployment and workers' compensation (See "The Fight For Independence," *Referee* 1/98). Last summer, a Colorado judge ruled that the Rocky Mountain Sports Officials Association (RMSO) was responsible for workers' compensation coverage for a new member who did not sign the RMSO's form specifically holding all officials to be independent contractors. And in Idaho, the state Supreme Court ruled that officials were to be considered employees for workers' compensation purposes.

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you can find a few local judges who have ruled that officials are employees," says Collins. "That may be because there is a presumption that courts want to find people to be employees so that those people can be protected from something fishy that may be going on, such as employers trying to duck out on their unemployment and workers' compensation obligations. So, I think that some courts may overprotect against that by finding most people employees, even when — as in the case with sports officials — they maybe shouldn't be."

It has been that sometimes-confounding unpredictability of state courts that has spurred state legislators to get involved in the issue.

In California, legislation was passed in 1995 — about a year and a half after the Santa Clara tax assessment — specifically providing that officials are independent contractors. In Idaho, legislators were so taken aback by the state Supreme Court's decision announcing officials to be employees that they virtually immediately passed referee independent contractor legislation, overturning the court's decision.

The reason legislation went through so quickly has to do with money, and lots of it. The states wanted to avoid the big tax assessment hit and stay off the hook for liability insurance. Deeming all officials employees could be very difficult financially. The hiring entities, such as the state or local school districts, and possibly the local officials associations, would have to pay out for unemployment insurance, social security taxes and workers' compensation benefits. Even if there were

extra cash in the coffers, that payout could be so high as to put everyone out of business.

Six other states — Alaska, Georgia, Missouri, Montana, Oregon and Virginia — also have similar referee independent contractor laws on their books.

WHICH WOULD YOU RATHER BE?

Though officials need to check their state laws before knowing upon which side of the independent contractor/employee line they stand, there nevertheless are some specific steps that officials can take to help push them toward either side of the question (see "What Can You Do?" sidebar). The question of which side of this line you would rather be on, however, is not as easy as it may seem.

On one hand, you might think that being characterized as an employee is the best way to go. After all, as an employee, you would never have to worry about unemployment insurance or workers' compensation coverage. You also would be able to specifically clarify controversial issues such as drug testing and gambling background checks through collective bargaining with your hiring entity.

"If officials are always considered independent contractors, conferences and leagues can treat referees as replaceable parts without any concern of an organized labor response," hypothesizes Greg Boyer, national referee chair for water polo. "To ensure fair

DETERMINING YOUR STATUS

How can you determine if you are an independent contractor or an employee? According to Internal Revenue Service interpretations, that determination must take into account all manners of control that define the relationship between the hiring entity and the worker.

Those manners of control can be divided into three categories:

The first is **behavioral control**, which determines whether the hiring entity has the right to direct how the worker actually does his or her job. In an officiating context, such control may be demonstrated by the hiring entity — such as the league, conference or city parks department

— giving the sports official specific instructions on when to work, where to work or how to work, or by giving the official specific training to perform the officiating services in a particular manner.

The second manner of control is **financial control**. Independent contractors are less likely to have their expenses reimbursed than employees are. An independent contractor also often has a significant investment in the tools of the trade, such as umpiring equipment. How the business pays the official is another factor, since employees generally are paid by time worked, while independent

contractors are usually paid per job.

The third factor of control examines the **overall type of relationship** between the hiring entity and the sports official. A written contract detailing the specifics of the employment relationship leans towards employee status, so does the business providing the worker with benefits, such as insurance, a pension plan, vacation pay or sick pay. That factor also examines the permanency of the relationship. Engaging a worker indefinitely, rather than for a specific project or period, is usually good evidence of an employer-employee relationship.

and equitable treatment, referees may wish to become organized and communicate with leagues and conferences with a unified voice. It is the classic scenario: United we stand, divided we fall."

Being considered an employee also comes with liability benefits for the official. Under the legal theory of "vicarious liability," employers are liable for any injuries that occur while their workers are in the course and scope of their employment — meaning that if an official is an employee, the hiring entity will be held responsible if someone is hurt during a game.

Curiously enough, it is actually that very issue that has pushed officials away from being employees and toward independent contractor status.

"If you have officials being considered employees, with vicarious liability, you create several very deep pockets — the school, the team, the league, the sport's governing body — all of which could be sued if someone is hurt because of an official's actions," explains Collins. "Do you think that those deep pockets would go for something like that? Of course not. Think about the situation where a municipality runs a city league game, and some guy gets hurt sliding into second and then sues the city parks department. That leaves the city out there for big money liability. That's one of the reasons that you see some states passing laws specifically saying that officials are independent contractors." In effect, under that theory, if officials become employees, it might not be worth it financially to the hiring entities to even have the games played.

That's just fine with those officials who prefer independent contractor status. Insurance programs offered by such organizations as NASO, ASA, USSF and the National Federation Officials Association (NFOA) have all but removed vicarious liability problems from the concerns of individual officials. Even though referees who are independent contractors might not be covered for injury damages by their hiring entities, they nevertheless can be covered through those insurance programs.

"Insurance really is the linchpin for saving us all from getting into enormous trouble," explains Collins. "Without that, we could be open to major liability."

As independent contractors, officials also have far greater employment freedom than is afforded to employees.

"I like the ability to say things like, 'I don't want to work tonight,'" says Ellinger. "That's a luxury not afforded to officials who are employees."

Of course, even that freedom comes with its price.

"Sure, I don't have to work if I don't want to, but if I decide not to work a few games, I have to think about whether I am ever going to get another job," explains Ellinger. "My assignor has every right to say, 'You know, I'm not going to go chase after Ellinger to

get him that game because he's been too damn picky.' That's a decision that I have to make as an independent contractor — to go to work or not to go to work, understanding that by turning down a particular assignment, I may have helped the immediate situation of that game on that night, but I might not have helped myself down the line."

And that makes the choice of where to fall on the independent contractor/employee line an important and personal one.

"When it comes down to it," says Ellinger, "you, the official, have to decide what's important to you and decide for yourself which way you are going to go." (Ted Curtis is an attorney and journalist in south Florida and an adjunct professor of sports management at Lynn University. He is a frequent contributor to Referee and NASO publications. This article is for general informational purposes only and is not legal advice. If legal advice is required, a competent professional should be consulted.) ☺



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For More Information ...

Want more information? Check out these publications:

"Special Report: Officials & Independent Contractor Status." Published by NASO, this report by attorney Don Collins can be obtained by calling NASO at 262/632-8855 or via the Internet at www.naso.org/rprt2.htm

"Employer's Supplemental Tax Guide: Employee or Independent Contractor?" This Internal Revenue Service publication outlines the differences between employees and independent contractors and provides examples of both situations. Numbered as "Publication 15A," the document can be obtained via the IRS' website at www.irs.gov/plain/forms_pubs/pubs/p15a03.htm.