



PAYROLL CURRENTLY

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No §530 Relief for Company That Treated Salespersons as Independent Contractors

In 2008, a U.S. District Court in Iowa ruled that salespersons for the Porter Livestock Company were employees, not independent contractors (see PAYROLL CURRENTLY, Issue No. 1, Vol. 17). The court has now decided that company owner Raymond Porter was not entitled to relief from employment taxes under §530 of the Revenue Act of 1978 [*U.S. v. Porter*, No. 4:05-cv-00464-JEG, 2009 U.S. Dist. LEXIS 82160 (SD Iowa, 7-21-09)].

WHAT THE LAW SAYS – Section 530 of the Revenue Act of 1978 provides relief from employment tax liability in employee classification cases when all of the following requirements are satisfied: (1) the employer has filed all federal tax returns (including information returns) with respect to the worker in question in a manner consistent with treatment of the worker as an independent contractor (reporting consistency requirement); (2) the employer has treated all persons holding substantially similar positions as independent contractors (substantive consistency requirement); and (3) the employer had a reasonable basis for treating the individuals in question as independent contractors. Reliance on judicial precedent, a previous employment tax audit, IRS technical advice, or longstanding industry practice may be used to establish a “reasonable basis” (see *The Payroll Source*®, pp. 1-5, 1-6).

Substantive consistency

Porter satisfied this requirement because the company consistently treated all of its salespersons as independent contractors. John Porter, Raymond Porter’s son, was treated as an independent contractor when he worked as a salesperson, but was treated as an employee when he stopped selling the company’s livestock feed supplements. The only other worker at the company besides the salespersons, who was involved with office work and feed supplement production, had always been treated by the company as an employee.

Reporting consistency requirement

Previously, Porter submitted an affidavit swearing that the company had provided Forms 1099 to all of the salespersons for 1996 and 1997, the tax years in issue. The IRS agreed that the company had filed Forms 1099 for the salespersons for 1997, but it had no record of receiving them for 1996. Porter then supplied copies of Forms 1099 he claimed to have provided salespersons for 1996, and the salespersons provided copies of their 1099 forms for 1996 and swore that they had received 1099 forms for every year they worked for Porter Livestock. Porter also provided copies of Forms 1096 for 1996 and 1997.

This was evidence in support of Porter’s affidavit, but it was not evidence that he actually filed Forms 1099 for the salespersons in 1996, said the court. Accordingly, Porter failed to satisfy the reporting consistency requirement for §530 relief.

Reasonable basis

Porter could not show that he had a reasonable basis for treating the salespersons as independent contractors. He said his treatment of these workers was



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based on advice from an attorney, who was deceased. The court explained that although the advice of an attorney or other professional advisor qualifies as technical advice for the purpose of §530 relief, here Porter's claim that he received legal advice was unsubstantiated. Porter's assertion that treating livestock-feed salespersons as independent contractors was an industry-wide practice was also unsubstantiated.



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Cable Splicers Were Not Independent Contractors Under the FLSA

Driftwood Electrical Contractors, Inc., helped to restore BellSouth telecommunications lines in Mississippi damaged by Hurricane Katrina. To perform this work, Driftwood hired Jeff Bankston and Fred Cromwell as cable splicers. They received a fixed hourly wage for working 12 hours a day for 13 days followed by one day off.

Bankston and Cromwell reported to a BellSouth location every morning to receive their assignments, unless they were continuing jobs from the previous workday. They received prints describing the work to be performed and were instructed by BellSouth supervisors to follow certain general specifications.

The splicers supplied their own trucks, testing equipment, connection equipment, insulation equipment, and hand tools; BellSouth supplied materials such as closures and cables. The splicers paid for their vehicle liability insurance and employment taxes; Driftwood provided workers' compensation and liability insurance.

When Bankston and Cromwell sued to recover overtime pay under the Fair Labor Standards Act (FLSA) for hours worked over 40 in a workweek, the Fifth Circuit Court of Appeals said that "as a matter of economic reality" they were dependent on Driftwood and BellSouth and not in business for themselves [*Cromwell v. Driftwood Electrical Contractors, Inc.*, No. 09-60212, 2009 U.S. App. LEXIS 22389 (5th CA, 10-12-09)].

WHAT THE LAW SAYS – Courts consider the following factors in deciding whether the "economic reality" of the relationship between a worker and an alleged employer indicates that the worker is an employee or independent contractor under the FLSA: (1) the degree of control that the alleged employer has over the manner in which the work is performed; (2) the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the degree of skill and initiative required for the work; and (5) the permanency of the working relationship. These factors are not exclusive, and no single factor controls the determination.

Balance of factors showed employee status

Bankston and Cromwell controlled the details of their work, were not closely supervised, and were not trained by Driftwood and BellSouth. They invested substantial amounts in their trucks, equipment, and tools. Their work required a high level of skill. These facts pointed in favor of independent contractor status, but they were not enough, said the court, to establish that Bankston and Cromwell were in business for themselves.

The splicers worked full time exclusively for Driftwood and BellSouth for approximately 11 months. They did not have a "temporary, project-by-project, on-again-off-again relationship with their purported employers," and the temporary nature of their emergency restoration work did not count against employee status.

The permanency of the splicers' work relationship during this time, along with the control Driftwood and BellSouth exercised over their schedule and pay, severely limited their opportunity for profit or loss. Bankston and Cromwell might not have been expressly prohibited from taking other jobs while working for Driftwood and BellSouth,



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but their work schedule effectively precluded significant extra work. Moreover, the fact that Driftwood and BellSouth provided Bankston and Cromwell with their work assignments limited their need to demonstrate initiative in performing their jobs.