

# In Practice

## Take Care When Classifying Workers

Attention training consultants: If you rely on independent contractors to deliver training, make sure you carefully document their employment status. Otherwise, you could wind up playing an expensive game of 20 questions with the IRS.

Frederick Gilbert, president of Frederick Gilbert Associates in Redwood City, California, found that out firsthand. In 1989, his growing company hired self-employed trainers on a per diem basis.

"We consulted three professionals—our company attorney, our CPA, and a tax attorney—and all three advised us that, according to the law, our per diem trainers were independent contractors," he says.

But in 1990, the classification prompted the IRS to audit the company. Eventually, the case was resolved in favor of Frederick Gilbert Associates.

According to IRS spokesperson Janelle Hunter, misclassification of workers—especially part-time and temporary workers—is a "persistent trouble spot." Companies that misclassify workers must pay back taxes plus interest, as well as stiff penalties.

The potential for misclassification increases when the economy lags, explains Marjorie Joder, a tax adviser in Naples, Florida. That's because employers hire more part-time and temporary workers and misclassify them—either willfully or out of ignorance—as less-costly independent contractors. Employers do not have to file payroll taxes for independent contractors, as they do for employees.

The "savings" that employers realize from misclassifying workers gives them an unfair advantage over com-



petitors who absorb the costs of properly classified workers, Joder notes. Also, many workers classified as independent contractors do not understand their tax obligations; later they discover they cannot collect unemployment compensation or Social Security because no money was paid into the system.

Employers have no straightforward test available to determine whether a worker is an employee or an independent contractor. The IRS relies on 20 common-law standards—often put to employers as questions—to determine a worker's status (see page 12). Cumulatively, the questions supposedly enable an employer to answer the overriding question: How much control does the firm exercise over the worker?

But each common-law standard is interpreted differently and carries a different weight in different cases. What constitutes control also varies, by custom, from industry to industry.

"In legal parlance, it's a facts-and-circumstances test, not a bright-light

*Classifying self-employed trainers as independent contractors could land you in hot water with the IRS.*

test," says Robert L. Sommers, a San Francisco-based attorney who represented Frederick Gilbert Associates.

Don't expect clearer guidance any time soon. Bills have been introduced in Congress to address the confusion legislatively, but they sit on a back burner as Congress deals with more pressing tax issues. For the same reason, the Treasury Department has not proposed regulations to clarify worker classification, says Joder, who served on an IRS advisory committee that studied the issue.

The Gilbert case is apparently the first in which the agency investigated a training company's classification of workers, but it's unlikely to be the last. According to Joder, the IRS in recent years has taken a market-segment approach to business audits; the agency trains agents to conduct audits in certain industries.

The customary practices of the training industry proved to be a key element in attorney Sommers's successful, three-pronged defense of Gilbert Associates. Sommers relied on section 530 of the Revenue Act of 1978, which asserts that the IRS cannot challenge an employer for classifying workers as independent contractors if the employer has a reasonable basis for doing so.

According to section 530, employers have a reasonable basis for classifying workers as independent contractors under any of the following circumstances:

- ▶ A previous IRS audit of the company did not dispute worker classifications, or settled such a dispute in favor of the company.
- ▶ A legal or administrative entity previously determined that the company's practice complied with the law.
- ▶ The company's practice of classifying certain workers as independent contractors reflects standard practice within a "significant segment" of an industry.
- ▶ The employer had some other "reasonable basis" for classifying workers as independent contractors.

In the Gilbert case, Sommers argued that



▶ Based on the 20 common-law standards, the company's per diem trainers were correctly classified as independent contractors.

▶ Judicial precedent had established that professionals similar to trainers who offer their services to the public are independent contractors.

▶ Other training providers treat part-time, per diem trainers as independent contractors.

What's your best bet for staying inside the law and outside of a courtroom? Here's advice from some experts:

▶ Get expert advice from a tax professional to determine the status of your workers. Tax attorneys and enrolled agents can help. (Enrolled agents are independent professionals who either spent five years interpreting tax law as IRS employees or passed a two-day exam sponsored by the IRS. To locate an enrolled agent in your area, check the phone book or call the National Association of Enrolled Agents at 800/424-4339.)

▶ The IRS will determine the status of newly hired workers for you if you file form SS-8, although some

tax professionals advise against relying on the IRS for a determination. "Generally speaking, the IRS would like everyone to be classified as an employee" and will lean that way "at the slightest indication," notes Joder.

▶ Have each independent contractor sign a contract verifying that he or she operates as an independent businessperson and that he or she understands the related tax liabilities.

▶ Carefully document the status of your independent contractors. Keep a file on each independent contractor with copies of his or her business license, contract, business card, letterhead, promotional materials, and other items that indicate that the person runs a separate business.

▶ File a 1099 form with the IRS for each of your independent contractors, showing the total amount you paid to the contractor for services.

▶ Keep tabs on how other training providers classify workers. Should you ever face a showdown with the IRS, you'll want to demonstrate that your stance toward independent contractors reflects standard industry practice in your area.

Gilbert and Associates compiled such evidence by polling other training providers by telephone. The com-

### Guidelines for Classifying Workers

Here are the 20 questions based in common law that the IRS uses to help determine if a worker is an employee or an independent contractor. Affirmative answers suggest that the worker is an employee.

Does the worker...

- ▶ have to comply with the employer's instructions about work?
- ▶ receive training from, or at the direction of, the employer?
- ▶ provide services that are integrated into the business?
- ▶ provide services that are rendered personally?
- ▶ perform work on the employer's premises?
- ▶ have to do his or her work in the sequence set by the employer?
- ▶ have to submit regular reports to the employer?
- ▶ rely on the employer to furnish tools and materials?
- ▶ lack a major investment in equipment or facilities?
- ▶ work full-time for the employer?
- ▶ have a continuing working relationship with the employer?
- ▶ have to follow set working hours?
- ▶ perform work for only one employer at time?
- ▶ offer services to the general public?
- ▶ receive payment for business and traveling expenses?
- ▶ receive payments of regular amounts at set intervals?
- ▶ hire, supervise, and pay workers for the employer?
- ▶ have no chance of making a profit or loss from services provided?
- ▶ potentially face firing by the employer?
- ▶ have the right to quit work anytime without incurring liability?

pany also cited as evidence a 1991 survey by the Instructional Services Association, which showed that most training businesses similar to Gilbert and Associates classify their workers as independent contractors.

► Make sure you have not mistakenly lumped any workers (for example, part-time clerical helpers) in the same category as training professionals who serve you as independent contractors.

Training consultants who hire part-time secretaries as independent contractors unknowingly endanger their companies, cautions Gilbert, who offers this last tip: If you've steered clear of hiring employees because of the payroll paperwork involved, hire a firm to handle the paperwork for you. "It's surprising how little it costs."

### High Court Clarifies Sexual Harassment

**A** November 1993 Supreme Court ruling will make it easier for employees to prove claims of sexual harassment and easier for employers to enforce policies barring harassment.

In *Harris v. Forklift Systems*, the justices ruled unanimously that plaintiffs need not prove that they were damaged psychologically by workplace harassment to win monetary damages. The court's opinion, written by Justice Sandra Day O'Connor, generally defined unlawful harassment as creating a work environment that a reasonable person would find "hostile or abusive."

Teresa Harris, a rental manager for Forklift Systems in Nashville, filed the suit under Title VII of the 1964 Civil Rights Act. She complained that company president Charles Hardy persistently made insulting sexual comments to her, which eventually drove her to quit her job.

A federal district court found that Hardy's conduct did not psychologically injure Harris and dismissed the case, citing 6th U.S. Circuit Court of Appeals precedent. The 6th Circuit, which covers Kentucky, Michigan, Ohio, and Tennessee, upheld the decision.

The 11th Circuit, covering Alabama,

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### Creating a Sexual-Harassment Policy

What constitutes a strong workplace policy against sexual harassment? According to attorney Daniel Weisberg of Pettit & Martin in Los Angeles, a comprehensive sexual-harassment policy should, at minimum

- ▶ state unequivocally that sexual harassment is prohibited and will not be tolerated in any form
- ▶ provide for a confidential reporting mechanism that enables employees to bring complaints to managers other than their immediate supervisors
- ▶ emphasize that all complaints of

sexual harassment will be investigated promptly

- ▶ ensure that if complaints are validated, the employer will act quickly to stop the harassment and punish the harasser
- ▶ make clear that employees making complaints in good faith will not face retaliation.

Make sure that all employees receive a written copy of the policy, Weisberg advises. Preferably, employees should acknowledge with their signatures that they have received and read the firm's policy on sexual harassment.

Florida, Georgia, and the Federal Circuit, which handles federal workers' claims, also required plaintiffs to demonstrate psychological injury before awarding monetary damages in sexual-harassment cases.

The high court's decision overturns this precedent. O'Connor's opinion states that courts may consider psychological injury as one factor, but not as the sole factor, in deciding such cases.

Federal law "comes into play before the harassing conduct leads to a nervous breakdown," O'Connor wrote. The ruling directs lower courts to consider the severity and frequency of the conduct and whether it interferes with a person's work. The decision also returned *Harris* to the lower court for reconsideration under the new standard.

Representatives of several business groups say that by making it easier for employees to prove sexual harassment, the ruling will make it easier for employers to crack down on supervisors who engage in sexual harassment.

Douglas S. McDowell, general counsel for the Equal Employment Advisory Council, which represents 270 *Fortune* 500 companies, said that previously, an employer who punished an employee for sexual harassment risked being sued if the victim lost the case. By making it easier for plaintiffs to win their cases, the ruling makes it less likely that defendants will sue employers for wrongful punishment.

### Capitalize on Kaizen Mine

Companies that implement total-quality management often get stuck in a mindset that says only teams can identify ways to improve the organization, says Robin McDermott, coauthor of *Employee-Driven Quality*.

Those companies miss out on the "kaizen mine," according to McDermott—the thousands of opportunities for small improvements throughout an organization that individual employees can identify and often implement.

Her advice? Take down the suggestion box that's gathering dust, and build an employee-suggestion system that complements a workplace driven by total-quality management.

McDermott and coauthor Ray Mikulak, president of Resource Engineering in Tolland, Connecticut, urge companies to devise Employee-Driven Idea Systems. Unlike most older versions of employee-suggestion systems, an EDIS

- ▶ rewards all ideas from employees equally, regardless of their monetary value
- ▶ stresses employee recognition
- ▶ encourages employees to focus on making small improvements in their own jobs
- ▶ enables employees to implement their own ideas
- ▶ ensures that all employees are equipped with basic problem-solving skills.

### Evolving Managers

Many managers find the concept of employee empowerment easy to preach but hard to practice. A new study from the Center for Creative Leadership in Greensboro, North Carolina, says managers can cultivate their ability to empower others by focusing on their own personal development.

The report, *Why Managers Have Trouble Empowering: A Theoretical Perspective Based on Concepts of Adult Development*, focuses on the characters of highly successful managers.

The report suggests that to empower employees, managers must play down the strengths that earned them their positions, such as ambition and a willingness to devote many hours to accomplishing large amounts of work. Successfully empowering employees requires other qualities, such as an ability to delegate and support others' growth.

For more information, contact the Center for Creative Leadership, 919/288-7210.

### Training on the Run

By Lori Pinello-Tegtmeier, Margaret G. Kendall, and Constance Courtney Staley, University of Colorado, 1420 Austin Bluffs Parkway, Box 7150, Colorado Springs, CO 80933-7150.

"Impossible!" That's how we reacted when a large court system asked us to teach its employees conflict-management skills—in a two-hour session.

Unfortunately, such requests are increasingly common. More clients ask trainers to deliver more training with fewer resources and in less time. To rise to the challenge, trainers must streamline their strategies and deliver training in ways that participants can easily integrate into their behavior. That's not a new hallmark for effective training, but it's one that has gained increasing prominence.

Our experience in designing an effective, compressed training program offers some guideposts for other trainers facing similar challenges.

To target our program strategically and make the most of our time, we

developed a "10-Minute Needs Assessment" consisting of eight key questions, and we distributed it to employees in their paychecks. Employees had one week to respond to the assessment; they were guaranteed anonymity.

In the assessment, we defined the term *conflict* as it's used in the workshop, and asked participants to

- ▶ describe their previous training in conflict management
- ▶ describe difficult co-workers
- ▶ estimate how much conflict they typically experienced on the job each day and how they tended to react.

Finally, the assessment asked participants to describe one highly charged conflict they had encountered at work and to consider what preparation might have helped them better handle the situation.

We wanted participants to leave the workshop understanding the value of productive conflict, being able to recognize different conflict-management styles, and having practiced strategies for dealing with difficult people. From these objectives, we developed a series of short modules and a workshop format. (See the box, "Workshop Modules for Training on the Run," page 16.)

When our two-hour workshop concluded, we asked participants to complete a "One-Minute Evaluation":

- ▶ What was the most useful thing you learned in this workshop?
- ▶ What questions remain in your mind as this workshop ends?
- ▶ What new options do you now have for dealing with conflict in your organization?

Results from the evaluation showed that 35 percent of participants said the most useful thing they learned from the workshop was a three-step technique for dealing with others during a confrontation:

- ▶ Provide an "I-message" to express how you feel.
- ▶ Describe the offending behavior of the other person.
- ▶ Tell about the impact this behavior has had on you and your work.

Respondents reported gaining a new awareness and a more positive approach to conflict. They said they wanted to learn more techniques for dealing with difficult people, dealing with the public and management,

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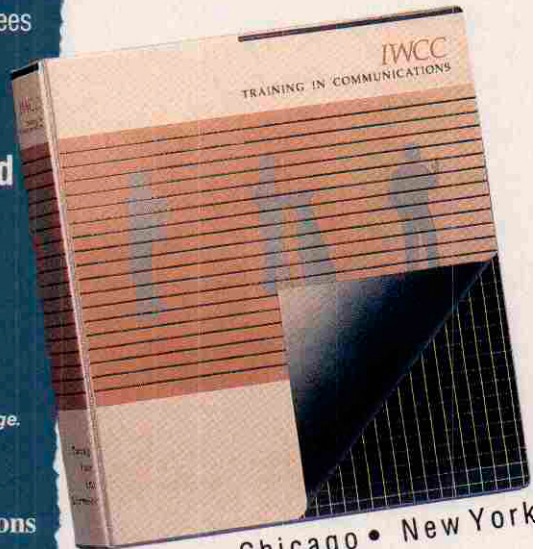
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### Workshop Modules for Training on the Run

#### 1. Introductions

Introduce yourself and welcome participants to the workshop. Start by presenting the workshop's objectives based on the needs-assessment results. Ask participants to introduce themselves and to identify their own objectives for the session.

#### 2. Warm-Up Exercise

Ask participants to write a metaphor for conflict that closely describes their feelings when in a conflict with someone. They then share what they have written with the group. In a nonintrusive, nonthreatening way, participants come to recognize their strong negative feelings about conflict (for instance, "conflict is an explosion," "conflict is a can of worms," and "conflict is a struggle.")

#### 3. Writing Exercise

Ask participants to write a brief paragraph describing an unresolved conflict with a co-worker. They are then asked to label this person. Labels are listed on a flipchart.

#### 4. "Lecturette" A

The list of labels for difficult people leads to a short "lecturette" on

the elements of conflict and a description of basic conflict styles.

#### 5. "Lecturette" B

Trainers present the Three-Step Confrontation Method to deal with difficult people in conflict situations:

- ▶ Provide an "I-message" to express how you feel.

- ▶ Describe the offending behavior of the other.

- ▶ Tell about the impact this behavior has had on you and your work.

A role-modeling session then allows participants to practice this new confrontation strategy.

#### 6. Open Forum

Give participants an opportunity to share with the group how they have successfully dealt with difficult people in their past experiences. This gives participants a chance to learn from one another and to share what they already know about handling conflict productively.

#### 7. Evaluation and Conclusion

Participants complete the One-Minute Evaluation form, and trainers summarize and conclude the session.

and gaining self-control.

We found that compressed training can produce positive changes in participants' perspectives. When every training moment counts, planning, precision, and applicability are paramount. If trainers craft their programs with precision, even training on the run can be effective.

### On the Other Hand...

A phone company in Alberta, Canada, discovered that it lost more money than it saved by trimming training.

When AGT Limited in Edmonton cut its training for new customer-service representatives from two weeks to one week, it calculated the cost to the company in dollars, reports the September 1993 issue of *HR Reporter*.

The company found that reps who received one week of training handled fewer calls and needed more time to complete transactions than reps who received two weeks of

training. The reps who received less training also made more mistakes.

The differences disappeared after reps spent six weeks on the job. But Rudi Nieuwendyk, AGT education advisor, determined that the compressed training cost the company more than \$100,000 during those first six weeks.

Based on Nieuwendyk's study and recommendations, the company restored the lost week of training—and added another two days.

### Baldrige Winners Announced

A chemical company and a rubber manufacturer have won the 1993 Malcolm Baldrige National Quality Award for excellence in quality management.

Eastman Chemical, a \$4 billion company that manufactures and markets more than 400 chemicals, fibers, and plastics, won the prize for large manufacturing. Ames Rubber Corporation of Hamburg, New Jersey,

won for small businesses.

Eastman, a subsidiary of Eastman Kodak company, ranks as one of the 10 largest chemical companies in sales in the United States and the 34th around the world. The firm employs 17,750 people and operates manufacturing plants at its headquarters in Kingsport, Tennessee, as well as in Arkansas, New York, South Carolina, Texas, Canada, and the United Kingdom.

Ames Rubber Corporation employs 445 "teammates" at its four New Jersey sites. The company manufactures rubber rollers used in office machines such as copiers, printers, and typewriters.

In announcing the awards, the U.S. Department of Commerce cited Eastman for its strong environmental and safety records, its success in launching new products, and its one-of-a-kind, no-fault return policy on its plastic products. According to the department, the company earns outstanding ratings from customers and has implemented multiple, integrated approaches to driving continuous improvement.

At Ames, the Commerce Department reports, every employee serves on at least one involvement group dedicated to quality improvement. Over the past five years, employees have found ways to save the firm—and its customers—more than \$3 million. Sales per employee shot up 48 percent from 1989 to 1992.

Companies that apply for the Baldrige undergo a rigorous evaluation by an independent board of examiners composed of public- and private-sector experts. Past winners include Motorola, Globe Metallurgical, Xerox, Cadillac Motor Car Division, Marlow Industries, and the Ritz-Carlton Hotel.

Congress established the award in 1988 to recognize U.S. companies that emphasize quality. It is named for the late Secretary of Commerce Malcolm Baldrige and is modeled after the Deming prize, a Japanese quality award.

*"In Practice" is edited and written by Erica Gordon Sorohan. Send items of interest to "In Practice," Training & Development, 1640 King Street, Box 1443, Alexandria, VA 22313-2043.*