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## Employers are Redefining Employees

Marc Linder

Larry Norton

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## WEEKEND PERSPECTIVES

*Marc Linder and Larry Norton*

# Employers are redefining employees

A spectre is haunting the United States — the specter of independent contracting. All over the country employers are seeking to rid themselves of their legal responsibilities by treating their employees as self-employed businesspeople.

Cotton farmers in Texas, for example, are getting away with paying their Mexican-American "hoe hands" \$2.50 an hour by classifying them as independent contractors. Here in Pennsylvania, clothing manufacturers call their female homeworkers independent contractors, even though they work on machines and materials furnished by the companies.

What's the employers' motive? Since the advent of the New Deal, progressive social change in the United States has been closely bound up with the employer-employee relationship. As a result, workers, by virtue of being employed, are entitled to the benefits of a whole range of federal and state statutes designed to enhance their market power and reduce the instability and insecurity inherent in an unplanned society. In an attempt to increase profits and undermine the solidarity working people have managed to achieve, employers and their industrial associations have been increasingly successful in creating the illusion that their distinctly dependent employees have realized the "American dream" of being "their own bosses." Specifically, here's what employers are seeking to avoid.

- Social Security tax.
- Federal unemployment-insurance tax.
- Workers-compensation premiums.
- Statutory minimum-wage or overtime payments.
- Withholding of employees' Social Security or income tax.
- Collective bargaining.
- ERISA pension benefits.
- Safety and health inspections.
- Race, sex and age discrimination complaints.
- Sanctions for employment of "unauthorized aliens."

This sleight-of-hand is made possible by the magic of Form 1099-MISC. Merely by filing this form with the Internal Revenue Service and furnishing a copy to the worker, an employer can create the legal basis for

## Point of view

eliminating — and shifting to the employees the burden of establishing their entitlement to — the protections and benefits of social legislation.

What is this magical Form 1099-MISC? According to the Internal Revenue Code, businesses must file it if they pay \$600 or more for services performed to a person not treated as an employee. How has it come to pass that this Statement for Recipients of Miscellaneous Income, which was once largely reserved for reporting payments of fees to attorneys, accountants and the like, now does standard service for the humblest hewers of wood and drawers of water?

A major impetus was given to this transaction by the Revenue Act of 1978. As a result of lobbying by the insurance, real estate, direct sales and other industries, which were seeking to thwart intensified efforts by the IRS to ensure that such employers did not evade their statutory obligations to pay Social Security and unemployment-insurance taxes, Congress inserted a provision (which was originally supposed

to self-destruct after one year but has now been extended indefinitely) that creates so-called safe havens for employers who have consistently treated employees as independent contractors for employment-tax purposes in reasonable reliance, among other things, on a "long-standing, recognized practice of a significant segment of the industry." Congress fortified the safe haven by prohibiting the IRS from publishing any regulations or revenue rulings regarding employment status.

What has been the effect of this mass production of self-employment? Many employees, unpleasantly surprised by the fact that the 1099-MISC brings with it the obligation to pay the self-employment Social Security tax — which is twice as high as the employee's share of the FICA tax — have been unable to pay it.

By and large the lowest-paid employees, who can least afford it, are being deprived of coverage under, and hence benefits from, the Social Security disability and retirement, unemployment insurance, workers compensation and minimum-wage laws.

What can be done about it?

1. Congress should establish for all federal protective social legislation a uniform definition of "employee."

2. Such a definition should include additional categories of so-called statutory employees whose status would not be subject to manipulation by employers.

3. A presumption should be created that all workers — but certainly all workers whose hourly earnings are in the vicinity of the minimum wage — are employees.

4. Congress should repeal the safe-haven provision of the Revenue Act of 1978.

5. No employer should be permitted to issue a Form 1099-MISC without prior approval by the IRS.

For more than a decade Congress has been unable to resolve the issue of employee status definitively. Its paralysis has stemmed from the conflicting claims pressed by various industry associations — a debate that has by and large not penetrated popular consciousness. The time has now come for the affected workers to speak up.

*Marc Linder and Larry Norton are legal services attorneys in Texas and Pennsylvania respectively.*