



New York State Department of Labor  
David A. Paterson, Governor  
M. Patricia Smith, Commissioner

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February 25, 2009



Re: Request for Opinion  
Independent Contractor / Employee  
RO-09-0024

Dear [REDACTED]:

This letter is in response to yours of February 13, 2009 in which you inquire into the status of part-time dance instructors as independent contractors rather than employees. Unfortunately, your letter does not provide sufficient information to make a determination. However, below please find an outline of the standards used for determining whether an individual is engaged as an independent contractor or as an employee under New York State and Federal Law.

The New York State Labor Law does not define the term "independent contractor." Therefore, there are no statutory means by which one may differentiate independent contractors from employees. However, it is well settled under the [New York] case law that the "determination of whether an employer-employee relationship exists rests upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results." (*Bhanti v. Brookhaven Memorial Hospital Medical Center, Inc.*, 260 A.D.2d 334, 335 (2<sup>nd</sup> Dept. 1999).) A contract that provides that the alleged employee is an independent contractor is not determinative in establishing that the employee is an independent contractor since such a determination requires an examination of the actual course of conduct between the two parties. (See, *Matter of Webley*, 133 A.D.2d 827 (3<sup>rd</sup> Dept. 1987).)

The Supreme Court of the United States has phrased the "central inquiry," in applying the Fair Labor Standards Act to this question, as "whether the alleged employer possessed the power to control the workers in question . . . with an eye to the 'economic reality' presented by the facts of each case." (*Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961), quoted in *Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 342 (S.D.N.Y. 2005).) The Courts have set forth many factors to consider when examining the "economic realities" of a situation. (See, *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1054-1059 (2<sup>nd</sup> Cir. 1988); *Zheng v. Liberty Apparel Company, Inc.*, 355 F.3d 61, 67 (2<sup>nd</sup> Cir. 2003).)

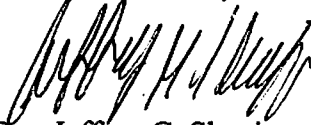
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Therefore, since your letter does not provide a sufficient factual basis upon which the factors enumerated above can be applied, under both the Federal and State lines of cases, no definitive opinion may be rendered at this time regarding the status of the part-time dance instructors referred to in your letter. If, after reviewing these cases, you wish to send us more detailed information regarding the relationship between the dancers and the individuals for whom they work with respect to the indicia of control mentioned in the case law, we will be better able to render an opinion in the matter.

This opinion is based on the information provided in your letter of February 13, 2009. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

A handwritten signature in black ink, appearing to read 'Jeffrey G. Shapiro', is written over the printed name.

By: Jeffrey G. Shapiro  
Associate Attorney

JGS:da

cc: Carmine Ruberto