

Employee vs. Independent Contractor: Avoiding Misclassification



Private Club Consultants

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Private Club Consultants

- PCC was created to provide in-depth legal and operational answers for the club industry
- Our mission is simple:
 - To help you implement new legislative and regulatory requirements – with minimal impact to your club’s bottom line, and
 - To help you minimize legal liability and keep your club’s private and tax-exempt status intact – without sacrificing your strategic goals
- We are “Your Trusted Source for Answers”



Our Roadmap



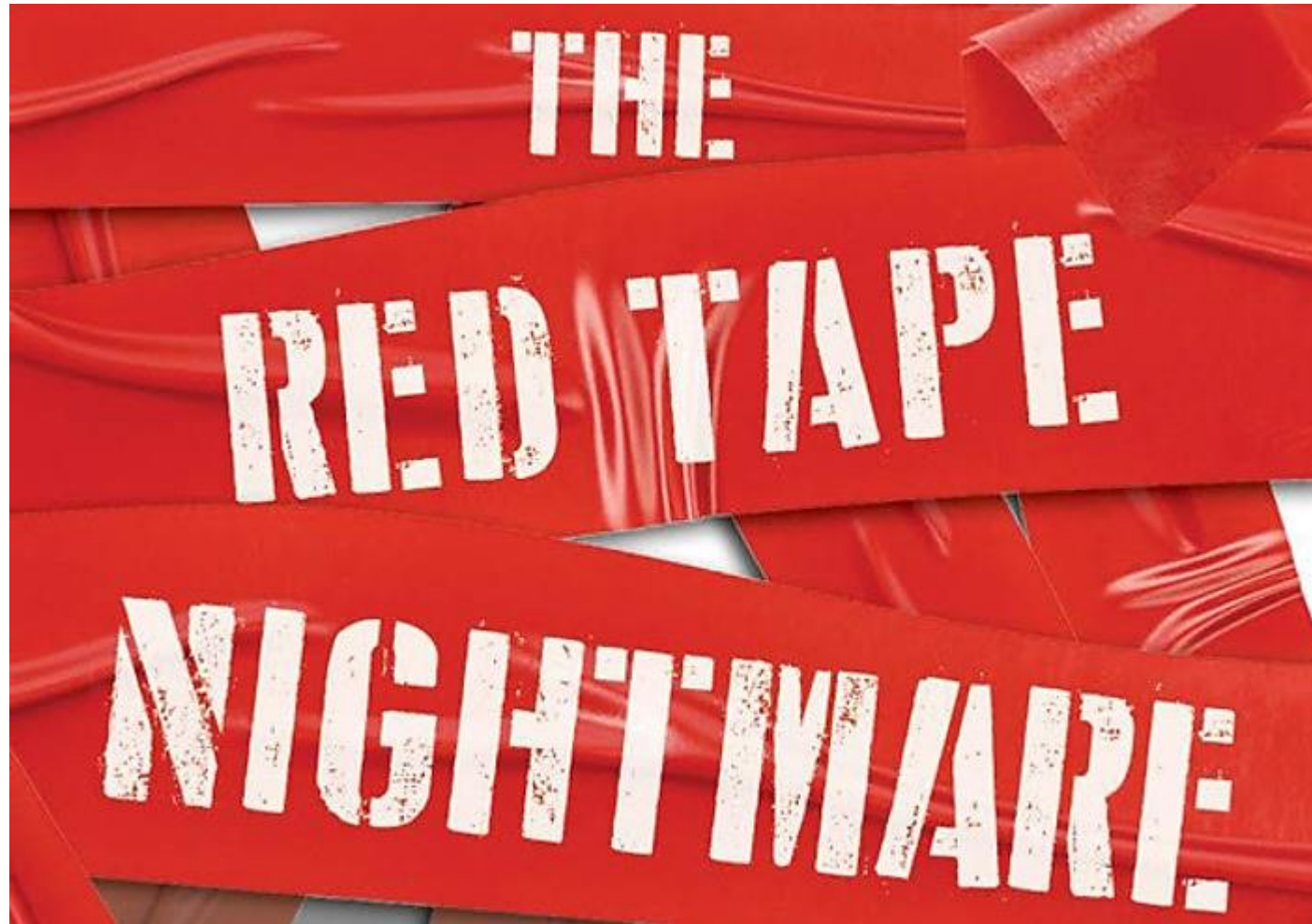
The Misclassification Problem & the Previous Rule

What Comes Next

How To Protect Your Club



Employee/Independent Contractor Classification



The Misclassification Problem & the Previous Rule

- Misclassification is more than a “tax problem”
 - Yes, there are tax issues but FLSA violations are worse – failure to pay min. wage and overtime
 - Federal cases filed against clubs – FL, GA, NY and CA fined Tesla for classifying janitors as ICs
- Most recent DOL Independent Contractor Rule was to go into effect 3/8/21
 - Established a more streamlines classification process with a safe harbor for businesses
 - Created a new “Economic Reality” test based on whether the worker was economically dependent on the club or himself for his work
 - Two core factors were the key
 - The nature & degree of control he has over his work (schedule, fees, ability to work for others, etc.)
 - The opportunity he has for profit or loss based on his own business acumen (not just working more hours)
 - Other factors: amount of skill required for the job, how permanent the relationship is between club and worker, and whether the work is an integral part of the club’s services
 - But the two core factors were to carry the most weight
 - Biden suspended this rule in January



What Comes Next

- Less than club-friendly federal rule coming
 - DOL working on a more restrictive rule – soon-to-be Sec. Marty Walsh will make this a priority
 - State laws and federal case law will still apply as well – WI 6-part test, MN 5-part test, ND 20-part test and SD 2-part test – all basically looking at control
- DOL will make CA's (and NJ's, & MA's) “ABC” Test the law of the land
 - (A) Worker must be free from the control and direction of the club
 - (B) Worker must perform work outside of the usual course of the club's business, and
 - (C) Worker must be engaged in an independently established trade, occupation or business
- NJ Gov.'s Misclassification Task Force recommendations
 - Personal liability for GM/COOs and Boards for misclassifying workers
 - Higher penalties - \$5K/worker for 1st offense and \$10K/worker for 2nd
 - New workplace poster on “Misclassification of Workers”
 - Clubs required to pay for state's investigation costs into misclassification claims



How To Protect Your Club

- Best practices to help ensure they are ICs
 - Clubs should NOT
 - Have ICs attend staff mtgs, ask for time off, do separate work at club or wear the club's logo
 - Set ICs' prices, schedule or pair them with members
 - Three options for ICs
 - Have members hire their ICs themselves – club is completely out of it
 - Educate members on their responsibilities – CaddieNow App
 - Engage third party entities to do the job – valet, fitness company, massage company, CaddieMaster
 - Reclassify ICs as employees – could provide best protection
 - Club has control over training, work, discipline and pay – ambassadors of the club
 - Members expect this service & will pay for it – caddie fee vs. cart fee, fitness class fee
 - They can still be tipped employees – so they can still receive cash
- This impacts caddies, fitness & yoga instructors, massage therapists and others



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