

Associates and Assistants

The Difference Between Employees and Independent Contractors - And Why It Matters to your Photography Business

by John Mireles

(Important Note: This article is for educational purposes only and should not be construed as legal advice. For legal advice, consult a legal professional. No guarantee is made towards the accuracy of the content.)

One of the trickiest areas of running a photography business is also among the most overlooked and rarely-considered. I'm referring to whether to treat your photography assistant as an employee for whom you pay various federal and state taxes and provide worker's compensation insurance or whether he/she as a independent contractor who is responsible for their own taxes and insurance.

If you're like most photographers, any assistant or second shooter that you hire is paid as an independent contractor. Once a shoot is done, a check gets written and out the door your assistant goes - not to be seen until next week's wedding or shoot.

Assuming that's your modus operandi, you're not alone. Without a doubt, that's the way most photo studios in the country works - and I'm not just talking about wedding studios. Commercial photographers, by and large, do the same thing.

Of course, if that were the proper (both legal and otherwise) way to do things, I wouldn't be writing this article. So, here we go into a rather gray nether world of how to classify your assistants and associates as either employees or independent contractors. Making the right decision will help you to stay out of trouble should things not work out the way you'd hoped.

Some Basic Terms

First, I'm going to define a few terms that often get thrown about:

- **Assistant:** Person who assists the photographer with technical and production aspects of the shoot on the shoot day (i.e. carry bags, set up lights, hold reflector etc). Usually someone who is hired to work for a specific project or shoot and is not a regular studio employee or worker. May or may not shoot photos during a wedding. (Note: I'll use the terms "studio" and "photographer" more or less interchangeably.)
- **Second Shooter:** Similar to an assistant, but usually a person with more experience. Often someone who has their own photography studio and books their own clients. As the name indicates, this person's primary function is to shoot photos along with the hired photographer on the wedding day. The terms second shooter and assistant are sometimes used interchangeably.

- Associate Photographer: A photographer who is hired by another photographer or studio to photograph a wedding as a primary photographer. This person photographs the wedding day without the presence or supervision of the hiring studio.
- Employee: Anyone who performs services for a photographer is an employee if the photographer can control what will be done and how it will be done. This is so even when the studio gives the employee freedom of action. What matters is that the studio has the right to control the details of how the services are performed.
- Independent Contractor (IC): A general rule is that the studio has the *right to control or direct only the result of the work* done by an independent contractor, and *not the means and methods of accomplishing the result*. We'll go into this more in a second. (Of note, the terms "freelancer" and "independent contractor" mean the same thing.)

While I created my own definitions of Assistant, Second Shooter and Associate Photographer based upon my own experience and knowledge of how those terms are commonly used, I took the definitions of Employee and IC directly from the IRS web site.

In the definition of Employee, you'll note that there are no exceptions dealing with length of employment or amount of pay. There's a common misconception that if the person is paid less than the \$600 IRS income reporting requirement, that the person is not an employee. Not true.

Dealing with Assistants and Second Shooters

Let's apply the definition of Employee verses IC to the real world situations of assistants, second shooters and associate photographers. In the case of the first two, there is little doubt that they should be treated as employees.

As noted in the definition of Employee, the key is whether the studio has the *right* to control how the work is performed. In the case of the Assistant, the photographer regularly tells the assistant what to do, how to do with, with what tools etc. Even if the hiring studio tries to argue that they don't actually tell the photographer what to do, there's little doubt that the photographer has the authority to tell the assistant exactly where he wants his camera bag and how he wants that light stand set up.

What about second shooters? In my opinion, though they tend to have more flexibility in the carrying out of their job functions, the primary photographer still has the right to tell them what shots to get, from where and what kind of equipment they should be using. I'll often direct my second shooter to get the shot of the bride walking down the aisle or stand in the back of the church while I run around getting the interesting stuff. That's control and that's what matters.

As a practical matter, if you hire second shooter who has their own studio, regularly books their own clients, has their own equipment, has their own liability and health insurance, you would be in a better position to avoid tangling with the IRS (though there is no guarantee) if you treat that person as an IC. Also, by virtue of the fact that the

shooter has their own insurance, you're less likely to be sued in the event that they should suffer an injury during the shoot. (More on that later.) Still, there are no guarantees so tread carefully.

Associate Photographers

Things are even less cut and dried when dealing with Associate Photographers.

Typically, an associate photographer receives an assignment from the studio to photograph and event. The studio may have booked the event, but the execution of the photography is left up to the photographer. Since there's nobody from the studio present during the event to control the associates work, the issue of control should be moot. Right?

Well, would that life be so easy. In answering basic issue of control, the IRS has three categories into which the relevant facts may fall. The following is taken from the IRS web site:

Behavioral Control covers facts that show whether the business has a right to direct or control how the work is done through instructions, training, or other means.

Financial Control covers facts that show whether the business has a right to direct or control the financial and business aspects of the worker's job. This includes:

- The extent to which the worker has unreimbursed business expenses,
- The extent of the worker's investment in the facilities used in performing services,
- The extent to which the worker makes his or her services available to the relevant market,
- How the business pays the worker, and
- The extent to which the worker can realize a profit or incur a loss.

Type of Relationship covers facts that show how the parties perceive their relationship. This includes:

- Written contracts describing the relationship the parties intended to create,
- The extent to which the worker is available to perform services for other, similar businesses,
- Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay,
- The permanency of the relationship, and

- The extent to which services performed by the worker are a key aspect of the regular business of the company.

Some Practical Tips

So what does all that mean for a studio hiring an associate photographer? The bottom line is that there are no easy answers. Whether your associate should be treated as an employee or an IC is going to depend on the facts and those are going to vary from studio to studio and associate to associate. Here are some practical suggestions to maintaining an independent contractor relationship with your associate photographer - though this is far from a definitive list:

- Don't dictate to the associate when, where and how to do their job
- Have the associate provide his/her own photography equipment
- Pay according to each job - not as a regular paycheck
- If the associate has his own studio or workspace outside of the home (but not in the photographer's studio), that's a sign that he's an IC, not an employee.
- Don't limit the ability of the IC to seek work from other studios
- Have a signed contract with the associate
- Limit the duration of the contract (you can always renew it when it expires)
- Specify liabilities if the associate fails to perform according to the contract
- Pay based upon a flat rate - not hourly
- Let the associate set the actual start and stop times and shoot locations with the client
- Don't pay for expenses or benefits

The Associate Photography Contract offered by La Oficina Inc.

(www.photographerstoolkit.com) takes much of the above considerations into account.

Keep in mind though that it's not enough to have a contract that lays out the relationship - it's the actual behavior of the two parties that will be the determining factor. Regardless of what contract you use, your best bet is to have a well-written contract and then do what it says.

But Why Does it Matter?

Understanding who is an Employee versus who is an IC is important for two reasons:

The first has to do with the IRS - as in they can come looking for you if you don't pay the proper employment taxes. If you hired someone as an IC, but they should have been classified as an Employee under IRS rules, you will be obligated to pay all of the back taxes due as well as penalties and interest. If you regularly work with someone who falls in that category, you could quickly find yourself in financial hot water.

The second reason why knowing who falls under what category is important has to do with liability reasons. If the IRS doesn't scare you, the consequences of a potential injury by your worker should. If an employee gets injured, they are entitled to medical care

and compensation from their employer. Usually, that's covered by a worker's compensation policy issued by the employer.

However, if you hire someone as an IC when they should have been hired as an employee and they get injured, your company is still liable. Worse, the usual liability insurance carried by photographers does not cover claims where work comp is or should have been involved. That means the money is coming straight from your pocket. Ouch.

Let's look an example of what could happen:

Long time pro photographer Jane Jasmine is hired to shoot a wedding. She in turn hires up-and-coming photographer Tom Smith to assist her on the wedding day. Out of habit, she agrees to pay him a flat rate on a freelance basis. On the wedding day, Tom is carrying a bag down some stairs when he trips and falls - in the process breaking his wrist and injuring his shoulder.

Because Tom is a struggling young photographer, he doesn't have health insurance. When the bill for \$5,000 comes from the emergency room, he has no way to pay it. At the same time, he can't work and suffers from pain in his shoulder for which he needs treatment.

Jane feels terrible about the situation and offers to help pay for his medical expenses. Still, Tom become increasingly upset because he's in pain and out of work. On the recommendation of a friend, he contacts a personal injury attorney who supposedly can help take care of his situation. Tom soon begins visiting an orthopedic surgeon and physical therapist. His bills eventually top \$15,000.

Tom's attorney presents Jane with a demand letter for \$75,000 which includes medical bills, lost wages, future disability, and pain and suffering. Jane attempts to turn the case over to her liability insurance company, but they deny it due to the fact that this should have been covered under worker's compensation.

Jane is now faced with the choice of hiring an attorney to fight the case, paying the damages or declaring bankruptcy and going out of business. Her short-sighted business practices have now ended in disaster.

The only way to protect yourself from this type of situation is by either not hiring assistants or second shooters or by having in place a worker's compensation policy and treating your assistants and second shooters as employees.

Granted, the likelihood of a significant injury like the one described is small, but the consequences are serious enough that there really is no choice but to protect one's self and one's business. On a side note, worker's compensation insurance premiums are based upon the number of hours that you have employees working for you. If you only have occasional help, the premiums should be reasonable.

At the beginning of this article, I pointed out the fact that most photographers treat their assistants as Independent Contractors. As we've seen, that's not the way the law sees it. So why isn't there a massive wave of litigation and IRS enforcement? Well, fortunately, injuries are rare and the IRS only has limited enforcement abilities.

The question for you as a business owner is, how much risk are you willing to take? Another way to look at it is how much do you have to lose?

I remember when I was a starving photographer starting out many years ago. I had to decide whether to eat or put gas in my tank. (I went hungry.) I can assure you that I really wasn't concerned about IRS regulations or liability concerns.

Nowadays, I own a home and the building that houses my studio. My studio employs several people full time and I have associate photographers as well. While following IRS laws and maintaining worker's compensation insurance isn't cheap, I'm not willing to risk the consequences of what could happen if I do otherwise.

I do recommend always adhering to the best business practices possible no matter at what stage your business is at. If you start sloppy, you tend to stay sloppy. Clients and associates notice the difference between a professionally minded client and one who's more seat of the pants or fly by night. In the end, good business practices are good for the bottom line.

John Mireles

Author John Mireles is a long-time photographer residing in San Diego. Although he's a frequently lecturer on the business of photography, he's also received many awards for his commercial and wedding images. You may view his wedding photography at www.ventanaphotography.com and his commercial work at www.johnmireles.com.