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Happy
Thanksgiving!



Part III of our analysis of the big three in social marketing assigns LinkedIn solid, but not world-beating scores when compared against our software marketing heavyweights. See pages 2, 4, 5, & 7.

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This Time, the Contract's Out On You

by Merrill R. (Rick) Chapman, Softletter

If you're not aware that federal and state governments are on a revenue rampage since the recession blossomed into its current malignant form in 2008, you've probably been hiding out in a used 2007 original iPhone box dreaming about the good old days and have just emerged (you may be tempted to crawl back inside the box until times improve but don't). And from the standpoint of tax hungry government bureaucrats everywhere, there are few targets as juicy as companies that have, or are perceived as having, abused state and federal wage and hour and Fair Labor Standards Act (FLSA) regulations that distinguish between true third parties working for your company on a consulting or contracting basis (sometimes called "1099s") and employees ("W-4s").

Traditionally, the three top targets for this type of revenue scrutiny are the transportation, hospitality, and construction industries, but these are well worked over opportunities. Busy revenue gatherers are now focusing on new, verdant revenue pastures such as high tech and software companies, which have traditionally been major consumers of contracting and consulting services. As of this writing, we're aware of three software firms under investigation for violating laws on the use of contractors, two at the state level and one on the federal; in all cases, the costs and legal fees to date have been substantial. To help shed light on this complex and, if you're not careful, expensive subject, we turned to Jeffrey Detler of the law firm Prince Lobel, specialists in this area.

Jeff, how does a software company legitimately identify and manage consultants and contractors? Why is this so difficult?

I can't give you a blanket answer to this question and that's why it's so difficult. For instance, the IRS when investigating these cases has a 20 factor test while every state has its own criteria on whether a person working for your firm deserves either 1099 or W-4 status. Massachusetts currently has the most restrictive laws on the books in this regard, so when crafting your company policies in this area I'd suggest using them as benchmark. But the fact remains that all of these entities don't appreciate companies misusing these laws and are vigorously going after companies that do. And the Obama administration has declared ending these abuses is one of their priorities.

But before we go further, I'd like to first dispel a couple of common
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Summary Results from The Softletter Social Marketing Survey for Software Companies, Part III of IV

The **Softletter Social Marketing Survey for Software Companies** was launched in August and closed at the end of October. The purpose of this project was to develop a comprehensive analysis of how software companies are using the primary social marketing systems, Facebook, LinkedIn, and Twitter, to build brand awareness, generate leads, provide customer support, and other key business activities. The survey recorded 126 valid responses, with 10 respondents stating their title was CEO, president, founder, or variant thereof, 32 vice president of marketing, ten vice president of sales, and the remainder a variety of director level titles in both sales and marketing. Throughout this report numbers of particular interest have been **bolded**.

LinkedIn Usage (cont.)

How many third party (not maintained by your company) LinkedIn groups do you participate in?	%
1 to 5	22%
6 to 10	20%
11 to 20	22%
21 to 30	4%
30+	16%
None	12%
Other, please specify	2%

Aggregated, 56% of respondents report they participate in 11+ LinkedIn groups; that's an impressive number of third party groups to monitor and interact with.

Do you maintain a corporate LinkedIn group?	%
Yes	47%
No	53%

How many members are there in your LinkedIn group?	Median
	200

What type of content do you post on your LinkedIn group? (Please pick all that apply)	%
Discussions (articles, comments on posted discussions)	83%
Events (webinars, videocasts, etc)	57%
Links	61%
News	57%
Photos	9%
Videos	9%
Other, please specify	0%

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myths in this area. First, the fact that a contractor or consultant is incorporated is not powerful protection against a labor standards investigation by a state or the feds. Under Massachusetts law, it makes no difference whatsoever; under IRS rules, it's one factor among the 20 they test for.

Second, having a contractor or consultant sign a contract or agreement that they are not an employee is also no guarantee of protection. It's better to have one than not, but it's not a determinative factor.

What does distinguish an employee from a contractor?

I'm going to use the Massachusetts test criteria to help frame my answer to this question because it's so restrictive. There are three primary factors that determine this. They are:

- The contractor or consultant is free from the direct control of your company in terms of how they perform their contracted tasks.
- The service they perform is outside the normal course of business engaged in by your firm. This is a test many companies fail; not passing it is the kiss of death in Massachusetts.
- The service done by the individual is offered by them to others, not just your company.

Let me break these down in greater detail. By control and direction, I mean that if your company requires a contractor to, for example, come into your place of work everyday, sit in close proximity to employees conducting the same tasks, and use company resources to accomplish recurring goals, your claim of contractor status becomes weak.

There can be exceptions to any of the above. If for testing purposes a contractor needed to load code onsite onto a new computing system and personally analyze its performance and suitability in real time, this would probably not violate the control and direction test. But if there was no such need and your company required the contractor to come to your place of work everyday so you could supervise them, you'd have a problem if you underwent an FLSA investigation.

But remember, you have to consider the entire picture when deciding control and direction. I represented a national magazine that treated all their sales representatives as independent contractors. All the reps worked out of their homes selling magazine and online advertising using their own computers. But the sales force had to attend conference calls twice a week, were given directives and sales goals, could call tech support to have their computers fixed, were able to access the company database for information on prospects and

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“Many software companies starting up today are either unaware of or ignore FLSA regulations. For example, just sitting in front of a computer doesn't make you a professional. If you're primary function is data entry, you're entitled to overtime.”

— Jeffrey A. Dretler
Prince Lobel

How do you promote your LinkedIn Group? (Please pick all that apply)	%
Company website	61%
LinkedIn ads	4%
Online media ads	13%
Other social media channels	35%
We don't promote our corporate group	30%
Other, please specify	0%

How often do you post in your group?	%
Daily	22%
Several times a day	0%
Weekly	22%
Several times a week	22%
Monthly	13%
Several times a month	13%
Other, please specify (Significant answers were "rarely")	9%

What percentage of your LinkedIn group membership participates in your group on a regular basis?	Median
	10%

What percentage of your LinkedIn group has opted in to receive mailings from your group?	Median
	10%

Do you send promotional mailings based on your firms' products and services to the members of your LinkedIn group?	%
Yes	39%
No	61%

What is the average response you receive to promotional mailings made to your group?	%
.10% to .25%	22%
.25% to .50%	33%
.51% to 1%	11%
1.1% to 1.5%	0%
1.6% to 2.0%	0%
2.1% to 3%	0%
3.1% to 4%	11%
4.1% to 5%	22%
5.1%+	0%
We don't track this	0%

On a monthly basis, how many customer service issues are resolved via your business LinkedIn account?	%
1 to 5	14%
6 to 10	0%
11 to 20	2%
21 to 40	2%
41 to 60	0%
61+	0%
75+	2%
100+	2%
We don't use LinkedIn for customer service	78%

On a monthly basis, how many sales leads are generated by your LinkedIn site?	%
1 to 5	37%
6 to 10	4%
11 to 20	8%
21 to 40	0%
41 to 60	2%
61+	2%
75+	0%
100+	2%
We don't use LinkedIn for customer service	45%

Do you use LinkedIn to build brand awareness of your company and its products/services?	%
Yes	84%
No	16%

Please rate the effectiveness of Twitter in improving these brand components	Very ineffective	Somewhat ineffective	Somewhat effective	Very effective	We don't track this
Increased favorable third party blog references and mentions	15%	15%	27%	15%	29%
Increased rankings in search engine results for keywords over which we compete	7%	15%	37%	22%	20%
Increased requests for and downloads of marketing material from our website	7%	12%	44%	12%	24%

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clients, all billing was done by the magazine and all receivables went straight to the company. When the “independent” contractor status of this group was challenged, the company quickly settled.

And this can be a very, very expensive process. If it’s found that a company has improperly classified a W-4 employee as a 1099, you can find yourself on the hook for:

- All back wages and benefits; normally they’ll go back at least two years and it can be longer, depending on the circumstances of the case.
- Pension plan and 401k contributions.
- Damages. In Massachusetts, **treble damages** are now mandatory.
- Payment of missed payroll taxes.
- Attorney’s fees in many cases.

Let’s explore “outside the normal course of business engaged in by your firm.”

This test refers to a contractor who does work that is not within the normal scope of your everyday business activities. I’ll use an example relevant to your industry. Let’s suppose you’re a SaaS company that wants to implement multi-tenancy into what has been, up to date, a single instance application. Your firm lacks the internal technical expertise to build this component in your software, so it turns to a third party who specializes in “snapping in” this capability to your system. This would be an example of work done outside your normal area or “scope.”

But lets assume that once the new MT subsystem has been integrated into your product you now want the contractor to attend regular development meetings to monitor customer complaints. You provide him a cubicle in your development facilities he can use to program in. You provide the contractor with a regular list of bugs in the system to be fixed on an ongoing basis. Improvements to the system are tracked into a project management system and the contractor is expected to develop enhancements on a scheduled basis. The contractor is also given access to your forum system to listen to customer complaints and suggestions about application issues and is also given access to your bug tracking system. At this point, your contractor starts to look very much like an employee and your liability has risen to a dangerous level.

And “the service done by the individual is offered by them to others”?

This is another area where companies often cross the line. You can’t, for example, fire your PR person, set them up with a consulting contract, have them send you a 1099, and then tell them that they’re expected to work for you exclusively. In point of fact, **any request** for exclusivity is an immediate red flag in the eyes of state and federal labor regulators. The contractor should be working in an industry in which there’s a market for their service with other companies. If you’ve developed some type of proprietary process that’s available only to your company and you “contract” out someone to manage and use this process to the benefit of only your firm, you’re skating on thin ice.

Here are some common danger points you need to monitor to avoid violating wage and hour regulations:

- Avoid hiring a contractor or consultant for over 12 months. There can be cases where its appropriate, but the longer the assignment goes, the more problematic becomes your claim that you’re hiring a third party.

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Please rate the effectiveness of Twitter in improving these brand components (cont.)	Very ineffective	Somewhat ineffective	Somewhat effective	Very effective	We don't track this
Increased requests for and downloads of marketing material from our website	12%	15%	34%	15%	24%
Increased attendance at lead generation events such as webinars/ videocasts/local tradeshows and presentations by our management	10%	15%	37%	12%	27%

How do you manage your LinkedIn programs?	%
Dedicated individual	35%
Dedicated team	17%
External agency	2%
Individuals in the company do it on their own	40%
Other, please specify	6%

What % of your overall marketing budget do your LinkedIn programs represent?	%
<1%	62%
1% to 5%	27%
6% to 10%	6%
11% to 15%	0%
16% to 20%	2%
20%+	2%

Please rank the overall effectiveness of your LinkedIn programs	%
Very effective	17%
Somewhat effective	56%
Somewhat ineffective	12%
Very ineffective	15%

As with Twitter, the aggregated score of 73% represents a good score for this marketing system, though neither system makes the top ten in our software marketing program rankings.

Wage and Hour Resources

- **IRS 20 Factor Test** (http://www.twc.state.tx.us/news/efte/appx_d_irs_ic_test.html): Link to page with IRS 20 factor independent contractor test. Also contains a link to the **previous** IRS 20 factor test. Enjoy.
- **United States Department of Labor** (www.dol.gov/whd/flsa/index.htm): Links to various information on the Fair Labor Standards Act (FLSA) and state labor laws.
- **Massachusetts Wage and Hour Information** (<http://www.mass.gov/?pageID=cagosubtopic&L=3&L0=Home&L1=Workplace+Rights&L2=Wage+and+Hour&sid=Cago>): Mass. state government site with links to specific information on the nation's toughest wage and hour regimen.
- **Prince Lobel** (www.princelobel.com): Law firm with expertise in wage and hour litigation.
- **HR.BLR.com** (<http://hr.blr.com>): Paid site focusing on HR compliance issues; allows subscribers to view wage and hour compliance laws state by state.

- Do not require regular attendance at company locations or require use of company facilities for the contractor or consultant to carry out their assignment.
- Avoid placing contractors in regular close proximity with other people in your company who carry out related tasks.
- Accept the fact that many assignments at your company will require an employee; don't try to game the system; the ultimate costs will not be worth it. For example, FedEx recently ended up settling a case for in California for \$2m when they tried to classify drivers as "contractors"; that's a difficult case to make when you're regulating meal breaks, requiring people to wear uniforms, billing customers directly, etc. FedEx has lost similar cases in Montana and Massachusetts. They've had some partial victories in other states but they're fighting against a rising tide.

What about employment agencies? What kind of protection do they offer against wage and hour cases?

Again, it comes down to the issue of control and direction. If the employment agency is staffing other companies and generating the payroll for your contractors, that's of course some protection. But if that consultant has been there for several years, sitting in the same cubicle, doing the same work as employees and not receiving benefits, a pension, and 401-K contributions while everyone else around them does, you have a potentially serious liability. The problem gets worse if this employment agency only staffs and does business with your firm. Needless to say, it's also a very bad idea to fund or create an employment firm that supplies contractors and consultants to only your company.

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