

***Hiring to Firing* Podcast — Are Reality TV Contestants Independent Contractors or Employees? From Pods to Paychecks With *Love Is Blind***

**Hosts:** Tracey Diamond and Emily Schifter

**Guest:** Richard Reibstein

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**Emily Schifter:**

Hello, everybody. We are excited to be here today on the *Hiring to Firing* podcast. We've had so many things for employers to be focused on in the news and in the headlines. Lots of big changes, lots of uncertainty. But today, we're going to focus on something out of the headlines that's a little bit more fun: a reality TV show. Tracey, do you have any favorite reality TV shows?

**Tracey Diamond:**

I do actually. My favorite reality TV show is *The Amazing Race*. I've always loved *The Amazing Race* and I always like to think about who would be the person that I would want to do *The Amazing Race* with, and it's really not anybody I know.

**Emily Schifter:**

It's a unique skill set for sure.

**Tracey Diamond:**

Absolutely. How about you, Emily? Do you have a favorite?

**Emily Schifter:**

It's kind of hard to pick, but I have to say I'm a big fan of *The Bachelor*. The timeless tale of people falling in love is hard to resist.

**Tracey Diamond:**

That's for sure. Well, listen in as we talk about a different reality series, *Love Is Blind*, and whether or not those contestants were independent contractors or employees.

[INTRO]

**Tracey Diamond:**

Welcome to *Hiring to Firing*, the podcast. I'm Tracey Diamond. I'm a labor and employment attorney with Troutman Pepper Locke and I'm here with my partner, Emily Schifter. Together,

***Hiring to Firing* Podcast — Are Reality TV Contestants Independent Contractors or Employees? From Pods to Paychecks With *Love Is Blind***

we handle all employment issues from *Hiring to Firing*. Today, our guest is Richard Reibstein, who is a labor and employment attorney and author and publisher of the popular blog, [Independent Contractor Misclassification and Compliance](#), which is the only legal blog in the country dedicated exclusively to publishing original content on the subject of independent contractor compliance and classification. And I should say Richard is our partner as well. Welcome, Rich, and so glad to have you here on our podcast. Why don't you tell us a bit about your practice and the blog? What made you focus on independent contractor issues in particular and what makes the blog unique?

**Richard Reibstein:**

Tracey, thanks so very much. When we started this compliance and misclassification practice and blog about 15 years ago, I wondered how soon was it going to be before other lawyers jumped on the bandwagon of enhancing IC compliance. Remarkably, there are no other law firms that have focused on IC compliance, probably because there are so many different tests for IC status at the federal and state levels, such that other practitioners, they tend to shy away from giving advice or simply tell clients what they can't do. And because we've read thousands of IC cases for our blog and written about so many, our practice is to really tell clients what they can do and giving them options on how to maintain their independent contractor business models while also maximizing compliance.

**Tracey Diamond:**

Telling clients what they can do is so much more practical for them than telling them what they can't do for sure.

**Emily Schifter:**

Especially in the HR world. Well, today we thought we would talk about the Netflix reality TV series and one of my admitted guilty pleasures, *Love Is Blind*, and the controversy surrounding whether on that show should be treated as employees instead of independent contractors. The show premiered in 2020 right before the pandemic, and it promotes itself as a social experiment where single men and women look for love and get engaged all before they ever meet in person. Our first clip gives a little explanation of what the show is all about.

**[BEGIN CLIP]**

**Contestant:**

I've met the person I want to spend the rest of my life with. I've never seen her before.

**Nick Lachey:**

Here, you will choose someone to marry.

**Contestants:**

Hello. Nice to hear from you.

**Nick Lachey:**

You can't say, "See you," without ever seeing them.

**Vanessa Lachey:**

If you're ready to find the love of your life.

**Contestant:**

Game time.

**Vanessa Lachey:**

The pods are now open.

[END CLIP]

**Emily Schifter:**

For 10 days, the contestants date each other while in pods, separated by a screen so they can't see each other. They meet face-to-face only after a marriage proposal is accepted, after which they had to a couple's retreat at a resort for one week where they meet the other couples who have also accepted proposals as part of the experiment. And many hi-jinks ensue, as you can imagine. After the couple's retreat, the couples return home to live in an apartment complex where they meet their partners' friends and families, integrate into each other's lives, and plan a wedding which is held, believe it or not, at the end of four weeks. During the filming, the contestants were each paid a \$1,000 daily stipend.

**Tracey Diamond:**

The show has been in the news recently for more than just wedding nuptials. In December 2024, the National Labor Relations Board issued a formal complaint against the show's production company, alleging that the company violated the National Labor Relations Act by misclassifying the contestants as independent contractors rather than employees. So before we dig into this case, Richard, can you explain what the difference is between an employee and an independent contractor, and why does this matter?

**Richard Reibstein:**

Tracey, let me give you the short answer and then summarize the long answer. For employees, you can direct them as to what to do and how to do it. But for independent contractors, while you can direct them as to what to do, you can't direct them how to do it. If a company tells a

worker or a group of workers how they need to perform their services, those workers are not independent contractors. They're employees. But even if a company doesn't tell workers how to perform the work, the company can unwittingly turn the workers into employees under most independent contractor laws by directing and controlling a bunch of other factors.

In assessing a company's compliance with most independent contractor laws, we look to more than 48 factors. But there are also a bunch of laws that use an abbreviated test for independent contractor status typically called an ABC test, which only examines three factors and all have to be met. There aren't many of those states with ABC tests, especially after California's tortured history following their enactment of an ABC test in 2020. Many lawyers advise clients not to use an IC model at all in ABC states, but we've developed ways in which we believe companies can still comply with those more challenging laws.

**Tracey Diamond:**

So the ABC states, even though it's just three factors instead of 48, that's actually the more restrictive states, right?

**Richard Reibstein:**

It's a much more difficult test to comply with because when you have a lot of different factors, no one factor is determinative. Whereas with the ABC test, if you miss any one of the three factors, you're doomed if you want to maintain an independent contractor status.

**Tracey Diamond:**

Rich, you alluded to California's tortured history. I know it's a long, tortured history and beyond the scope of our podcast, but can you just give a short, little synopsis of what happened there in California?

**Richard Reibstein:**

Sure. In California, the problem is that there are as many as 75 exemptions from the ABC test. And if you are exempt, you fall back to what I regard as a multifactor test where I can use as many as 48 different factors. But there are so many exemptions that what has happened is that everyone is litigating for years over whether they fit into an exemption or not, and not whether they actually meet a particular test for independent contractor status.

**Tracey Diamond:**

So either you're not exempt from the ABC test and you have to meet the restrictive ABC test in California or if you fit within one of those many exemptions, then you have to still meet a test, but it's the broader 48-type factor test, right?

**Richard Reibstein:**

Correct. And what happens is that most of the disputes now are, "Do they qualify for the exemption?" And so it's introduced an entire new element of litigation that has really distracted from the focus that California tried to do, which is saying, "We don't really encourage independent contractors in the state. We'd like to have all people being employees with certain rights and benefits." The problem unfortunately is also, and this is a big problem in California, they swept into that category of folks that would be considered employees under the ABC test a whole bunch of traditional freelancers that had been independent contractors for decades, whether they are photojournalists or newspaper contributors and a whole bunch of other professional services.

In addition, there's a ton of drivers, including rideshare drivers, that got swept in. And as you may recall, there was something called Prop 22 in California where the voters basically said, "We don't want our rideshare drivers and our personal shoppers to be covered by this ABC law. We like them to be performing the service that they're performing as independent contractors. Because otherwise, we think it's going to go away or our prices are going to increase crazy." So under the circumstances, other states that have looked at the California experiment have concluded, "This is not for us. We're not going to go in that direction."

**Emily Schifter:**

Yeah, I know California in general and the complexities of trying to do business there is its own story, I think. But when you've got an employer who's got individuals working in California, but also in other states, it's got to add a whole other layer of complexity if they've got a business model that's a little bit easier to challenge in California than others. Do you often see employers in multi-states facing that challenge?

**Richard Reibstein:**

Most of our clients are in many different states, some of them in all 50 states.

**Emily Schifter:**

Oh, wow.

**Richard Reibstein:**

And when we do that, when we talk to the clients they realize that they may be solid in some states and iffy in some other states, but they're not going to change their business model. Very, very few companies have reclassified independent contractors to be employees. And those that have, generally it's because these folks should never have been independent contractors to begin with. It was a weak classification and it just wasn't worth it because there was no way that they could transform them into legitimate independent contractors, so they just decide, "Let's reclassify and make them employees."

**Tracey Diamond:**

This seems to come up a lot for both Emily and me, I know, because we've talked about this before in the context of due diligence and deals. And I often find that clients don't really understand the risk of and dangers of misclassifying independent contractors in terms of how much it could cost them in liability. And I know from working with you in the past, Richard, that that's a big issue, that liability can come from all different angles. You want to talk about that a little bit?

**Richard Reibstein:**

That, I think, is really the crux of what we do as lawyers in our independent contractor compliance practice. We have been reading cases for the last 15 years and reporting on hundreds and hundreds of them, so we've gotten pretty comfortable with what clients can do and what they really should try to do in order to enhance their defense when faced with an independent contractor misclassification case. And so what do we do? We talk to them about their contracts, about their relationship with independent contractors and about their practices, and we go over a huge number of factors, 48 or more. And what we do is we give them options, "Hey, you can do the same thing and with the same result being just as profitable if you do it this way rather than that way." And many of the clients say, "Oh. We never thought about that."

And so what we learn is that there are multiple ways to skin the cat. However, the one way that you don't really want to do it is to go backward. Why would you not want to go backward? It's a signal to the workers that maybe they've been misclassified. And all of a sudden, if you do that, A, you'll lose your most entrepreneurial independent contractors because they want to be their own bosses, and B, for others, you may prompt them to actually file a lawsuit against you. So clients typically prefer enhancing their independent contractor compliance instead of either giving it up or, in some other way, not elevating their compliance. This is what we do and clients are so thrilled to actually realize that instead of worrying about independent contractor misclassification, which as you say can be a very substantial liability, they're now in a position where they are comfortable, that they're far less likely to be sued. And if sued, they're far more likely to prevail.

**Tracey Diamond:**

If they get it wrong, it could be pretty expensive in terms of a government audit, in terms of unpaid overtime wages, unpaid benefits, unpaid taxes. It could come at an employer from all sorts of angles, so important to get it right.

**Richard Reibstein:**

And that's what motivates companies to enhance their compliance and to say, "Hey. If we're at a C- now, can you get us up to an A-?" And we say, "Yeah. B+ or A-, we can get you there."

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**Tracey Diamond:**

Well, let's turn back again to *Love Is Blind* because this lawsuit really caused quite a ripple in the employment world. In our next clip, Nick Thompson, who was one of the contestants, along with one of the other contestants filed a charge that led to the National Labor Relations Board picking up the complaint. Let's take a listen.

[BEGIN CLIP]

**Nick Thompson:**

Based on the investigation from charges filed by Renee Poche and I through the UCAN Foundation, the NLRB filed a complaint against *Love Is Blind* producers, Kinetic and Delirium, for misclassifying the cast as independent contractors instead of employees. Well, why does this matter? Because employees have important legal protections and rights that contractors don't have. Protections like minimum wages, overtime pay, the right to speak freely about your working conditions, the right to organize, form a union. All of these things are prohibited in the *Love Is Blind* participant contract. So many of the provisions covering confidentiality agreements, the \$50K in damages fees if you decide to leave without a producer's permission, the \$4 million arbitration filed against Renee, restrictions on doing other shows or press, legal retaliation threats of which I got one myself. Those are all deemed illegal. This means all of the cast members from *Love Is Blind* can now speak freely about their working experiences without being punished by unlawful fines or threats of retaliatory legal action from the production companies.

[END CLIP]

**Emily Schifter:**

So clearly, this contestant felt strongly that he was an employee, but Richard, what was the basis for the board's conclusion on its part that the contestants were employees?

**Richard Reibstein:**

Emily, the NLRB's complaint doesn't articulate its reasoning. It relies almost exclusively on the contract clauses in the contestant agreement, which the producers refer to as a participant agreement. Essentially, those clauses in the participant agreement, as drafted by lawyers, contain a rather considerable degree of direction and control over the contestants' performance of services. So that's what the NLRB's regional director, who issued the complaint, is undoubtedly relying upon, the very contract produced and used by the producers.

**Tracey Diamond:**

Talk about the law of unintended consequences, right? Here they did the right thing in putting a contract together, but it created bad evidence instead of good evidence.



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**Richard Reibstein:**

I am sure the lawyers are outstanding as commercial lawyers. But as independent contractor lawyers, there aren't many of those folks who actually draft these types of things around the country and do so in a way that enhances independent contractor compliance. Why is that? Because IC compliance is counterintuitive. A great deal of those things that you would think are consistent with independent contractor status are actually factors that are used against independent contractor status. Now more importantly than the contract, however, is whether the contestants were, in practice, actually directed and controlled as to how they perform their services. We don't know that from the complaint because the complaint doesn't say what happens in practice, but oftentimes what occurs in practice is a key determinant for independent contractor status. I'm going to assume that there is some level of directional control over how the contestants perform their services, render their services.

One doesn't need to direct and control. Even though this is a performance, you don't really need to do that. The reason is that you can make suggestions. You don't have to give directions. You don't have to tell people that you have to do it this way. If you give them thoughts, suggestions, recommendations, and let them decide how they're going to actually render the services, that, in many ways, makes a far more compelling production. And in the world of independent contractors where they're entrepreneurs, it makes them even more effective as entrepreneurs and the return on investment is even higher.

**Emily Schifter:**

So you're telling me that they should just let it be unscripted the way that they claim?

**Tracey Diamond:**

Well, that's what's so interesting about this, right? Because it's giving us this little peek behind the curtain of what really goes on with reality TV. From the TV viewers' perspective, these folks are out there just looking for love. And from the contestants' perspective, they should be treated like employees because they're under so much direction and control by the production company.

**Emily Schifter:**

That's right.

**Tracey Diamond:**

I don't know. Have you guys seen the show, *Unreal*? I believe it's on one of the streaming services.

**Emily Schifter:**

I have.



**Tracey Diamond:**

Isn't that a great show? It's sort of like a fake reality series and a total behind-the-scenes peek at all the manipulation that goes on to get the contestants to do what the production company wants them to do, so highly recommend it. Getting back to this case though, Rich, what's the next steps and do you think what will happen next will be impacted by the Trump administration?

**Richard Reibstein:**

Yes and no. The NLRB has a regulation on independent contractor status and that is based on the Biden administration, and that is undoubtedly going to change. But like most questions about whether some worker or a group of workers are independent contractors or employees, they're likely to be found to be one or the other regardless of which regulation is used. Why? Because most of the people who are determined to be either independent contractors or employees don't fall in the middle exactly, where tilting that the regulation may do one way or the other, whether it's a Biden administration regulation or a Trump administration regulation, that can tilt the scales a little bit.

So if they're in the gray area, it's very possible that the new administration's regulation may say, "Hey. On balance, these folks are employees or independent contractors," but again, most cases are not very much exactly in the middle. In addition, the regulations aren't really binding as a matter of law. Courts are the ultimate determiners and the courts have a long history, decades, of applying the Federal Fair Labor Standards Act. They're not going to necessarily abide by any dueling regulation from one administration or the other when they have their own cases that they've relied on for decades.

**Tracey Diamond:**

Particularly after *Loper Bright* when there's less deference, getting rid of the Chevron deference for agency decisions.

**Richard Reibstein:**

Those are on traditional regulations. But here, these regulations aren't quite frankly the type of regulations where you and I and most other lawyers and stakeholders are accustomed to. These regulations are really interpretations of court cases. They're saying, "The courts said this and said that." Well, the courts know what they said. They don't need an agency to tell them what they said. And so these regulations seem to be more in the nature of briefs for plaintiff's lawyers and government agencies who may be bringing their own claims. They're certainly not the type of regulations that say, "You need to do A, B, and C in order to comply with the law."

**Emily Schifter:**

Sure, and certainly this is just one regulation. This is just what the NLRB has decided and we've talked about there's other damages that people can get. You've mentioned the Fair Labor Standards Act, state laws. What do you think, Rich? Do you think that the board's decision in

this case makes it more or less likely that a court might find that for purposes of other laws, that these contestants are employees rather than contractors?

**Richard Reibstein:**

Emily, there are a lot of workers, or people who are service providers, that don't fall into the traditional employee or independent contractor model. Student athletes. Are they students, athletes, or employees, or all three of those things? Same goes, for example, for franchisees. Are they franchisees, independent contractors, or employees? And so what you have is laws that say you could either be an employee or a non-employee, and many people don't fit easily into the notion of being an employee. Ask contestants. They don't think they're employees. Ask student athletes. They don't think they're employees. They want to get paid, but they don't think they're employees. They know they're students. When you go to franchisees, they feel as though they're an owner of their business. Are they? Or are they employees?

This is yet another case where government agencies and plaintiff lawyers are trying to fit a round peg into a square hole. So it's really hard to draw much from this case other than this particular industry needs to take a real firm look at itself and decide, "Are we going to keep things the way they've been going and subject ourselves to lawsuits, or do we want to take some corrective action and enhance our independent contractor compliance if, in fact, these folks are not employees?"

**Tracey Diamond:**

To your point about, "Is this it? Does the board's action have sway?" we should note that this wasn't the only case involving whether or not *Love Is Blind* contestants should be considered employees versus independent contractors. I understand that the production company behind *Love Is Blind* also separately settled a class action lawsuit, alleging wage and hour violations. The settlement was for \$1.4 million. And in that case, a different contestant alleged that that \$1,000 stipend was equivalent to \$7 an hour, which was less than half of California's minimum wage where the production was recorded. So this one situation already kind of manifested itself in two separate ways involving two separate statutes.

**Richard Reibstein:**

I don't really understand that lawsuit because if you're getting paid \$1,000 a day for a daily fee, I don't know how you can be making \$7 an hour.

**Tracey Diamond:**

The math didn't really make much sense to me either, but the concept of not being paid minimum wage is a valid one.

**Richard Reibstein:**

Let me say in California, New York, Illinois, Massachusetts, and some other states, if you don't dot your Is and cross your Ts, it's not just overtime and minimum wage, but they also have

penalties for failure to provide certain notices to workers, for failure to give pay statements that are required if they are employees, for failure to give paid leave, for failure to provide a lunch break and things of that nature, and there's penalties associated with those. And so unfortunately for a lot of companies, those types of things, which really have a very valuable role for workers who have been denied those things, when there's a question of whether they're independent contractor or employees, there's no independent contractors who are ever accorded those types of benefits because that's not consistent with an entrepreneur. It's not consistent with people who are not employees. Those penalties can add up considerably and that's what sometimes causes these very meaningful, substantial amounts in settlement.

Interestingly enough, very few of these settlements do companies ever agree or are companies ever required to reclassify workers as employees. Instead, the lawsuits are about recovering some money. All these folks want to earn more. This is just one way in which they can do it. It doesn't change the relationship.

**Tracey Diamond:**

Interesting.

**Richard Reibstein:**

But it is something that is available to plaintiff's lawyers and government agencies if they want to take that position.

**Emily Schifter:**

As a tool.

**Tracey Diamond:**

So if the board ultimately wins, is this going to change the way the reality TV show industry does business?

**Richard Reibstein:**

I don't think so because it really depends on whether the producers are going to take this as an opportunity to enhance their independent contractor compliance. If they do so, for example, if they would come to us, we would tell them, "You can do this. You can do that. Maybe you're at a C- or D+. You can get up to a B+, maybe an A- if you avoid direction and control that you really don't need anyway, both in your contracts and in your practices." Most clients that we talk to appreciate and understand that, and they say, "Well, yeah. We can do it another way," and maybe it's just as effective that way. They don't realize that they have alternatives. That's what we present them with. So if the companies in the reality TV industry want to enhance their independent contractor compliance, they can. Will they? Different story. If they don't, it'll be lengthy litigations and potential exposure and could be a very substantial liability.

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**Tracey Diamond:**

So that's about all the time we have today. Thank you so much for joining us today, Rich. This was a great, interesting discussion. Thank you to our listeners for listening in. I hope that you found this to be a really timely and important topic. Check out our blogs. Rich, what is your blog?

**Richard Reibstein:**

Well, you can find our blog at [independentcontractorcompliance.com](http://independentcontractorcompliance.com).

**Tracey Diamond:**

And you can find our firm's other blog at [hiringtofiring.law](http://hiringtofiring.law). Thanks so much, everybody.

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