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When You Wish Upon a 1099 - Transcript

[Speaker 1]

Welcome to Charity Therapy, a podcast from Birken Law about building better nonprofits. I'm your host, Jess Birken. Hello, and welcome to this episode of Charity Therapy.

Today I am joined by my good old pal, Tom Wertish.

[Speaker 2]

Hello, hello.

[Speaker 1]

Tom is the co-founder and broker at Options Insurance, and funny story, Tom and I actually have a long history of making content together. Back when I was first branching out to put some educational stuff together for nonprofits, I dragged Tom into my office to make a series of YouTube videos about insurance that nonprofits need. And I think we took like seven months trying to like figure out how we would make a YouTube video.

It was like so much fear and like uncertainty about getting started. And then I remember we got started and it was like, oh, that was easy. What the hell did we take all that time for?

[Speaker 2]

Right. Oh my gosh, it was so out of my comfort zone and now we're out of my comfort zone again in podcasting. But you know, I bought this mic after our YouTube adventures, like thinking I should do a podcast.

And then here we are, Jess Birken pushing me into doing new fun things.

[Speaker 1]

There we go.

[Speaker 2]

Funny thing about the YouTube videos is one of my team members was searching for something related to nonprofit insurance. And she's like, I pulled up your video. Hey, that's so, you know, obviously, we're YouTube famous now we're going to be podcast famous, too.

[Speaker 1]

Oh, well, you are one of my favorite people. So, thanks for sticking with me on this new adventure here.

[Speaker 2]

Likewise. Yeah. So happy to be here.

[Speaker 1]

Right. Me, too. All right.

So, I wanted to have you on this episode because I get a ton of insurance questions from clients and listeners. And I thought, you know, who better than to have you chat about them with me? So let me just first ask you if there's one thing that you wish like all nonprofits knew about buying insurance.

What would it be?

[Speaker 2]

Short answer is that a nonprofit is a business for a nonprofit still has requirements. They still have obligations. They still are an entity, even though the it can be a good cause, obviously a good mission.

But we still have to take care of kind of the back of the house and insurance is one of those pieces of it.

[Speaker 1]

Yeah. So TLDR, y'all's need insurance, even if you didn't think you did.

[Speaker 2]

True story.

[Speaker 1]

Oh, OK. That's great. Let's get into our first question.

Ready?

[Speaker 2]

Ready.

[Speaker 1]

All right. Number one. Here we go.

Our nonprofit does a lot of community outreach and community-based projects. Sometimes if one of our organizers who are all independent contractors is out flyering the neighborhood, they might snag someone from the neighborhood and pay them to help for the afternoon. The organizers have cash from our petty cash fund and will pay folks out of this fund.

We run on volunteers and contractors and don't carry workers comp insurance. Should I be worried about this?

[Speaker 2]

I don't know that I'd spend much time worrying about it, but I'd take some action on it. So, the short answer is you need some protection for those people if they're operating on behalf of the organization, which they are, it doesn't really matter how you have decided you're going to pay them, whether it's 1099 contractor or even volunteer labor. There is a risk exposure there that something bad could happen even when people are doing good things.

So yes, a lot of nonprofit policy packages are designed to include some coverage for volunteers because a lot of nonprofits use volunteers. But if you are using people and you're paying them

to further the mission, they are in the eyes of the workers' compensation laws, they are considered, that's an employee-employer arrangement. It's not like you have the electrician coming to fix the light bulb and he or she has their own business.

It is someone that you're directing their work, the time that they're on the job, the purpose of what they're doing. So, in the eyes of the people where it matters, it'd be considered an employee-employer relationship and which the law would be applicable would be workers' compensation if there was an injury on that job.

[Speaker 1]

Yeah, this situation is giving me a little heartburn. You know, I'm not an accountant, I'm not a CPA for nonprofits, but this whole business about they're walking around with all this cash from a petty cash fund and just paying people off on the street, now I get it, right? Community organizing, you're in an area, maybe there's somebody who's underemployed, unemployed, just kind of kicking around on a corner, you're giving them a way to contribute, to participate in the economy in a legal, meaningful way.

I love that. But I also am like, please go talk to your accounting people to make sure that this is the right way to do it. And then, yeah, like, well, now are we subject to wage and hour laws?

How are you keeping track of it?

[Speaker 2]

There's just a lot of- All the protections that come with the employee side of that, yeah, if you're not doing the right thing, it doesn't absolve you from liability or responsibility. And we are seeing like stepped up enforcement on that because, you know, at the same time, the government's missing out on payroll taxes and a lot of other things that are, you know, important to them to collect. So, we have seen, you know, increased enforcement on this whole, like, how are people being paid?

Are they paying them properly?

[Speaker 1]

Withholding taxes.

[Speaker 2]

I think it's something to protect yourself on. And yeah, it's unfortunate. Nobody wants to spend money on insurance.

It's just it's not fun. It's not exciting. It doesn't actually do anything until you need it.

Right. And then it's the life changer for the mission. Either you had it and could protect yourself or you didn't have it.

And maybe it's the end of the organization. You never know. Right.

And just good people can still have bad things happen to them.

[Speaker 1]

And that's the thing. And what I like about this question is that they are focused on the workers comp question, because I do think there's probably some legal problems with how they're paying these people. But in reality, is the IRS going to figure it out and come after you?

Probably not. But what is more likely is somebody like slips and falls while flyering for you, smacks their head on the side of a mailbox. And somehow this comes back to haunt you with that.

That's absolutely real.

[Speaker 2]

That's right. Yeah, I had a firsthand example. So, my son fell in our backyard and broke his arm and we took him to the clinic and, you know, got the cast made and everything.

And then we got a letter from our insurance company and said, we're investigating your claim. We want to know a bit more about where this happened. How did this happen?

You know, and we checked that it was on our property, but they had checkboxes for did it happen on the job? Did it happen at someone else's house? All these different things.

And they wanted you to check a box for the insurance company to tell where it happened so that they could potentially see if they could recover some of their money from another policy.

[Speaker 1]

Yeah. And that's the thing that I think nonprofits in particular don't realize, because everybody's like, oh, well, our volunteers aren't going to sue us. Well, no, they probably won't, especially if they're regular volunteers who are committed to your mission.

They probably don't want you to get in trouble. But when they tick the box on that form, being honest about where this injury happened, it's kind of out of their hands because there's this whole concept of subrogation, which is a legal word that just means the insurance company can come into your shoes and stand in your shoes and, you know, basically go seek damages from the responsible person on your behalf. And you don't have to give permission for that, right?

[Speaker 2]

It's part of your contract with your insurance company that they have the right to do it. Yeah.

[Speaker 1]

Yeah. So, it's not that your volunteers are going to be mean and come after you. It's that the insurance companies are mean and going to come after you.

All right.

[Speaker 2]

We can align in our, yes, agreement with that.

[Speaker 1]

Yeah.

[Speaker 2]

The mean insurance companies. Oh, dear.

[Speaker 1]

All right. Question two. I am the founder of a small nonprofit, and we just started a free book program.

I have a 1099 contractor I hired to help. We don't want to deal with having employees. So it just seems easier to have a contractor instead.

Oh, boy. My board said this person might need to be an employee because we set a schedule for them two days a week. The work they do is loading boxes of books and making deliveries to the places where we distribute the books on specific days.

[Speaker 2]

Well, this kind of gets back into the first question a little bit. A, I would applaud your board for thinking about that and hopefully have some directors and officers insurance coverage for your board because, yeah, you got smart board members to bring that up. But yes, it doesn't matter how you want to classify them, 1099 versus W-2 employee.

If they're working on behalf of the mission, the organization, if somebody hurts themselves while throwing books around, that's going to come back to that same question. It's not going to necessarily be the volunteer or the 1099 employee that does that. It's going to be their insurance company.

How did this happen? Where did this happen? You're going to want some coverage for that.

And it might seem easier to consider them a contractor in terms of payments, but it's not. Everything else will be easier if you do it properly and then have the protection if something terrible happens that you have the coverage. So, you are protecting them.

[Speaker 1]

Yeah, I see this a lot, especially with small nonprofits. They're just like, well, I don't want to mess with all of that or what? I'm not sure that we can keep paying an employee.

And so, I'm worried about having to lay somebody off because we don't maybe have the money coming in. All of a sudden, maybe a contractor feels like easier to spin it up and spin it away. Right.

But the reality is you can call someone a contractor, but they can still be deemed an employee. It's not people just want to. It's a 1099.

And everybody shakes on that. And it's good. No, actually, it can come up that this person is determined to be an employee.

And all of a sudden, you are responsible for wage and hour laws. And it's not just because the contractor agreement says they're a contractor. The IRS, in particular, looks at a couple of different factors like the relationship you have with them, the financial control you have with them, and whether you get to control their behavior.

So, in this person's question, they're saying we set their schedule. We tell them what days to come in. We tell them what to do, where to go, how to do it.

That all is on the employee side. Right.

[Speaker 2]

It is. And there's a few different resources that if we have show notes, I could prepare some links that are out there for this is a frequently asked question in a lot of different industries. Contracting is another good example where subcontractors might be considered employees.

And so, there's been some clarification from the Minnesota Attorney General. There's clarification from the federal, the IRS. There's different tests that people can apply or different logic and say if they meet these requirements, then, yes, they are considered an employee and you're considered an employer.

So, I'd be happy to include some links to help people get some clarity on what are we doing? How is this person operating within our organization? And does that mean that he or she is an employee in the eyes of the people where it matters?

[Speaker 1]

That'd be great. We will definitely put those in the show notes. Here's one thing I want to know from you is when does this reclassification thing come up and does it come up through the sort of like work comp claim scenario is the workers comp situation where this determination can get made?

Someone gets so that in this instance, they're loading boxes. The drop, you know, they drop a box of books on this poor person's head, right? They have a TBI.

They check the box on the form at the hospital or whatever that says this happened at work. Um, now the insurance company or whoever is looking into this, is that where a determination can be made to allege that this, you know, they get a personal injury attorney, whatever. How does this come up where they get rendered an employee when they were a contractor?

[Speaker 2]

Yep. Yep. So, what'll, you know, typically happen is that's exaggerated.

It'll occur at the time of the incident, which is when it's too late, right to, to, uh, you know, change the fact then the insurance company. We'll say, where did it happen? They'll check the box.

It happened on the job. I books fell on my head when I was working for this nonprofit. Okay.

What's the name of the nonprofit? The insurance company will reach out to them. What's the name of your workers' compensation carrier?

We don't have one that then goes to the state where the state may pay the claim out of a state fund, but then assess that payment back to the organization because they did not have the policy, maybe a fine, maybe a penalty, all those sorts of things. Because obviously people have to get better. So yeah, it's usually discovered as part of that process.

And you know, that's when it's too late.

[Speaker 1]

Well, right. And that's where I think nonprofits, small nonprofits, especially are just like, but they, but we called them a contractor. So, so they're a contractor and it's like, yeah, but someone else somewhere down the might decide that they're an employee who's entitled to workers' comp coverage.

And that's, I think the part that people don't really understand that that can happen.

[Speaker 2]

Yeah. Yep. Totally agree.

That's why it's just smart to just take a look at it early on and then you're factoring it into your overall budget. And then once you've done the right thing, then it can become not top of mind, nothing to worry about. Just goes in the back of your mind that yes, we have these policies in place.

So, to have things happen that are catastrophic, that we have somewhere to look for coverage. So, we can just get back to furthering our mission.

[Speaker 1]

And you can get coverage for non-employees, right? So, you can cover your 1099 folks. And one of the things, you know, as a small employer myself, you know, when I first hired someone, I was kind of terrified of all of the responsibility and the cost that was going to come with it.

And one of the things that I realized was that like workers comp insurance is not that expensive. When you're talking about just a couple employees, a very small team, it's not a huge lift as an employer. So just get the dang insurance.

[Speaker 2]

Exactly. No, we're not talking about like tree trimmers or roofers or people that clean like windows on skyscrapers for these non-profits. You know, those can be expensive work comp or if you're driving forklifts around.

But, you know, if you're typically just doing, you know, office clerical things or low kind of not intensive labor.

[Speaker 1]

Walking around the community, ladling soup at the soup kitchen, maybe you're cooking, maybe, you know, a lot of nonprofit work is not super high risk. I mean, there are some things that can be, but it's better to just go ahead and get the quote than to avoid the issue.

[Speaker 2]

I agree. And also, you know, when you're looking at that, there's also volunteer exposure to when you have a volunteer working on behalf of the organization. That's why you look for a specific non-profit policy versus just a general business policy, because then it'll address the nature of volunteers.

Because I think as much as Jess or I would like to have people volunteer to help our businesses, that's just not how it works. But in a non-profit area, you're going to get volunteers to help. So, you want to make sure your policy includes language to cover volunteers while they're working on behalf of the organization.

[Speaker 1]

Well, that tees up our last question here, which is about volunteers. So, the questioner says, the non-profit I help run is a 100% volunteer run food pantry with folks who serve food, deliver food, and do manual labor to process everything. I say, since we're a non-profit and doing good work, we shouldn't have to pay for workers comp or other insurance for our charity work.

But one person on my board disagrees and is being difficult. What kind of insurance do we need to have, if any?

[Speaker 2]

So yeah, with a volunteer organization, you know, stuffing food, there still are those same exposures that would be out there. You have a general liability exposure. If anything happens with your, you know, food, it could contaminate, who knows, some other people.

You have volunteers that could get injured. That would be addressed in like a non-profit package policy or like a volunteer accident policy. And then, yeah, if anybody's getting any wages or compensation and they are injured on the job, then that's, yeah, that's a work comp claim.

So yes, back to the people that are doing good things. Kind of bad things happen to them, and we still have to make sure that we're covering that because if something happens, it's probably not going to be, you know, the volunteer that sues. It's going to be that insurance company trying to recover their funds back from the organization.

[Speaker 1]

Yeah, and this, you know, I say, since we're a non-profit doing the good work, we shouldn't have to pay. I mean, if I had a nickel for like every time somebody was like, but we're a non-profit, as their answer to a question. It's like, no, no, no.

Yes, but.

[Speaker 2]

Yeah, and I could agree with you, but we're not the people that you have to convince.

[Speaker 1]

Right. It's like non-profit is a tax status, not an excuse to get out of every requirement of running a business, you know? And this comes up in so many ways, right?

Like, but we're a non-profit, we shouldn't have to pay for our overhead that we need. We should get free everything or, but we're a non-profit, we don't need to follow the employment laws or, but we're a non-profit, you know. Once you have that mindset, it's just really invasive into your whole operation.

And so, the person who wrote this question needs to start listening to the difficult person on the board, because the person on the board who has the fiduciary duty is not being difficult, they're trying to do what's in the best interest of the organization. And sometimes that's a hard pill to swallow when you kind of realize like, what? We have to spend a whole bunch of our money on these things that we don't really value, like insurance and legal and tax prep.

And that can be hard for people to understand, but you do have to run it like a business to some degree, right? And I think that's one of the major takeaways here, is being a non-profit doesn't mean you can just ignore that you are a business that has insurance risks, right?

[Speaker 2]

Totally agree. And there's a whole host of experts on a lot of different topics that are happy to help. So, you can take that off your plate and get back to what you want to do, but you really just have to make sure the back of the house is all taken care of so that you can keep furthering that and growing.

[Speaker 1]

Right. So, you know, the other things I think from these questions are get the insurance you need, you know, don't skimp on the insurance. You don't do that in your personal life, hopefully.

So don't do it for your non-profit's life either. And then the other thing that's coming up for me is the takeaway here is, you know, it's really important to run the test on the contractor situation. There's a lot of questions about contractors and all of that.

If you are hiring, you need to figure out is this position better as an employee or is it truly meeting the test for being an independent contractor? Because just because you say they are doesn't mean it's right. So, we will put your links in the show notes, Tom, and thank you in advance for providing that and thank you for being here.

[Speaker 2]

Yeah, it was my pleasure. It was a lot of fun. And, you know, another getting out of the comfort zone with the podcast.

Now, maybe I'll have to do some more podcasting.

[Speaker 1]

There you go. Well, if listeners want to connect with Tom, you can find him at options-insurance.com. And hey, if you enjoyed this episode, would you do me a huge favor?

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About the Author



Hi, I'm Jess Birken.

I'm the owner of Birken Law Office, I help nonprofits solve problems so they can quit worrying and get back to what matters most – The Mission. I'm not like most attorneys, I actually have an outgoing personality, and – like you – I like to think outside the box. Most of my clients are passionate and have an entrepreneurial spirit. I'm like that too. My goal is to help you crush it. Getting bogged down in the minutia sucks the joy out of the important stuff. My clients want to do the work – not the paperwork.

Let's connect!

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