

Independent Contractor or Employee?

Today's competitive environment compels employers to find ways to reduce labor costs and increase operational flexibility. Many employers have opted for hiring "independent contractors" instead of traditional employees. Unfortunately, many employers misclassify employees as independent contractors when, in fact, they are true employees. Governmental agencies are aware of this tactic and closely scrutinize these relationships. Many employers also erroneously believe that they can avoid liability for employee claims if they contract for workers through a temporary service or leasing agency. Unless the relationship between the parties is carefully structured, however, employer obligations and liabilities are not escaped.

Most agencies apply the common law "right of control" test to determine independent contractor status. The test focuses on whether the one for whom a service is performed substantially retains the right to control the manner and means by which the task is accomplished. If so, that person probably is an employee.

The "right of control" test considers:

- 1) Control over the hours and methods of work;
- 2) Method of compensation;
- 3) Who supplies the instrumentalities, tools and place of work;
- 4) Intent of the parties;
- 5) Degree of integration of the worker into the normal business operations;
- 6) Restrictions on delegation of work placed on the worker;
- 7) Duration of the relationship;
- 8) Whether the worker is exposed to potential profits or losses; and
- 9) Availability of worker to others for the performance of same services.

By utilizing true independent contractors, businesses can save on costly benefits accorded to and payroll taxes paid for regular employees. Overtime compensation is avoided and paperwork is reduced. However, those misclassified as independent contractors have frequently sued their "employers" alleging such things as wrongful termination, denial of benefits and

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denial of overtime compensation. Sweetheart arrangements often turn sour upon termination of the relationship.

If an independent contractor is re-classified by a government agency, costly ramifications arise. For example, if the employer unsuccessfully contests a workers' compensation claim on the basis of independent contractor status, back payroll taxes may be assessed. In addition, the employer may become responsible for any benefits paid and the state may file a lien against the employer. Furthermore, even if independent contractor status is sustained, the employer loses the immunity against personal injury suits accorded by the workers' compensation laws. A general liability policy may not insure against such a risk.

Improper classification as an independent contractor also can trigger liability under laws requiring deductions and contributions, benefit laws, wage-hour laws, discrimination statutes, the National Labor Relations Act, the Immigration Reform and Control Act, and unemployment compensation laws. Thus, an employer may be exposed to unexpected risks.

Many employers believe that the mere recitation of independent contractor status in an agreement is controlling. It is not. Similarly, many employers believe that employee claims of liability can be avoided if they contract for workers through a temporary service or leasing agency. Again, such relationships with a third party are no guarantee of immunity from liability.

Only by careful evaluation, taking into account the "right of control" test, can an employer retain the protections afforded by a true independent contractor relationship.

Bob Dunlevey

Board Certified Labor & Employment Law Specialist