



**Employee
vs.
Independent Contractor**

Overview

- Why Is It So Important?
- What Laws Do We Need to Be Concerned About?
- What Are the Differing Criteria in Determining What Is An “Independent Contractor”?
- Common Pitfalls and Mistakes
- Penalties

Why Is It So Important?

You are responsible to and for the actions of your employees – do you know who they really are?

One size does not fit all

- Not all laws define independent contractors the same way;
- Differ by subject matter;
- Can differ between federal vs. state law;
- “More than 1099ing someone”

What Laws Do We Need to Be Concerned About?

There are many laws that protect or provide benefits to employees...some of these include:

- Workers Compensation laws
- Unemployment Compensation laws
- Wage and Hour laws
- Federal and state tax laws

Many require employers to pay taxes or assessments on “employees”



Independent Contractor Criteria

While they are not the same, they share one thing in common:

- There is not a single bright line answer
- All provide for factors to consider in evaluating a relationship between parties
- Evaluating the factors should be done collectively



Independent Contractor Criteria

IRS - Common law test:

- Most well-known test
- Considered by IRS in evaluating employee vs. independent contractor
- Factors broken down into 3 categories:
 - Behavioral
 - Financial
 - Type of Relationship
- Relevant for companies in knowing whether to generate “W-2” or “1099” in reporting income;

Independent Contractor Criteria

IRS - Common law test:

- Behavioral Factors:
 - Type and degree of instruction
 - What is the level of evaluation of the work performed?
 - Is training provided?



Independent Contractor Criteria

IRS - Common law test:

- Financial Factors:
 - Significant investment in equipment?
 - Unreimbursed expenses?
 - Opportunity for profit or loss?
 - Services available to market?
 - Method of payment?



Independent Contractor Criteria

IRS - Common law test:

- Type of relationship:
 - Written contract?
 - Employee benefits?
 - Permanency of relationship?
 - Services provided is key to the business?



Common Pitfalls

Ask yourself:

- Individuals providing same services as independent contractors as others are providing as employees?
- Did company retain right to exercise direction and control over service regardless of whether the right was exercised?



Common Pitfalls

Ask yourself:

- o Individuals providing services for an employer that are not reflected on the employer's business records?
- o Individuals providing service who are paid "off the books," "under the table," in cash or provided no documents reflecting payment?



Common Pitfalls

Ask yourself:

- The contracting entity provides equipment, tools and supplies to individuals or requires the purchase of such materials directly from the contracting entity;
- Alleged independent contractors do not pay income taxes or employer contributions to the state unemployment agency.

