



# Independent Contractor Versus Employee Employer Beware

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Every employer must face and resolve the question of whether its labor force is comprised of employees or independent contractors. Misclassifying employees in the wrong category has significant and dire consequences. Failing to properly classify workers subjects an employer to civil penalties, class actions, fines and the assessment of back taxes, among other consequences. Additional costs can also arise when misclassified workers, who would otherwise be entitled to employee benefits, haven't been provided those benefits.

Why would any employer risk misclassification by choosing to classify workers as independent contractors? The appeal of the independent contractor status is best understood by evaluating the benefits of utilizing independent contractors.

Using independent contractors relieves the employer from responsibility for payroll taxes, workers compensation insurance, social security, Medicare and other withholdings. For certain employers, the use of independent contractors may also reduce the company's obligations under OSHA. An employer is responsible for these obligations when its workers are classified as employees. Employees will also be entitled to Title VII protections and can sue an employer for discrimination.

How should an employer proceed given the risk of misclassification? What is the test? There is no one single factor that determines whether a worker is an employee or an independent contractor. Using an independent contractor agreement may be helpful in proving a worker's independent contractor status, but it is not conclusive. Adding to the complexity, is the fact that the IRS, the U.S. Department of Labor, varying state agencies and legal precedent have all weighed in with slightly different tests.

This is an area of the law where employers are advised to seek the advice of competent legal counsel to assist the company with this very important decision. An ounce of prevention here will more than justify the potential cost of the cure.

Among the factors considered in making the determination is the amount of control exerted by the employer over the worker. Increased control makes the worker more likely to be an employee.

Does the worker determine what materials and equipment are used? Do they determine the methods and techniques used? If the employer provides all tools and equipment and/or controls the

methods and techniques used to perform the job, this suggests that the more likely result is that the worker is an employee. The length of the job, and how the individual is paid are additional factors.

Does the worker work elsewhere, in addition to the employer in question? Does the employer pay for training of the individual? Does the employer set the hours of work? Can the work be terminated without violating the terms of a contract? Is it possible for the worker to lose money? Employees, of course, don't generally face the risk of losing money.

In contrast, indicators of an independent contractor often include: having an established business, advertising services via electronic or print media, use of business cards and business stationary, providing services concurrently for other businesses, carrying insurance, determining one's own schedule, etc. A painting contractor is a common example given as an independent contractor.

These lists of tests and factors, however, are not exhaustive. Misclassification is one of the hottest topics in employment law and employers must give serious consideration to these and other factors in making the right choice as to the correct classification of workers.

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