

Ernst Enterprises Newsletter



Independent Contractor or Employee?

It's not quite that simple...

In last week's newsletter we talked about employee misclassification being a minefield that can catch the unwary employer. Another classification, **Independent Contractors**, is one that is also causing major headaches for employers and often time big legal tax bills too!

What is an independent contractor? The answer most employers would say is an individual who you contract with to provide services for your business. But can you contract for any type of service? Are there limits to the kind of services you can contract to receive? The short answer is yes: there are limits.

To begin, many business owners and executives feel that the advantage of using independent contractors over hiring employees is greater flexibility with lower fixed costs. That initial assessment may be true, however, using independent contractors does have limitations, primarily in the loss of control over how the work is performed and other key areas.

These questions of whether to contract for services must be balanced with the liability to the employer for misclassification, meaning the law can hold after the fact, that the independent contractor is in fact an employee.

The determination of whether an independent contractor is properly classified is NOT exclusively based on what the company and contractor decide. Proper classification of an independent contractor must pass several tests on both the state and federal level. For example, the IRS publication *Determination of Worker Status for Purpose of Federal Employment Taxes and*

Income Tax Withholding has multi-factor tests to assess Workers' responsibilities/involvement with respect right to control, risk of loss, etc. The Department of Labor relies on an *Economic Realities Test*, and other agencies on both the state and federal level all have tests to determine if an independent contractor is properly classified.

If you are found to have improperly classified an independent contractor the company can be liable for all the back FICA, FUTA, income tax, unemployment tax, plus fines and penalties! The current recession along with loss of tax revenues, depleted unemployment funds, etc., are the forces driving increased scrutiny and enforcement activity by both state and federal agencies.

WARNING SIGNS

- You have independent contractors and employees doing the same work;
- You brought back a laid off employee into an independent contractor role doing the same kind of work s/he used to do before they were laid off;
- You manage and direct the activities of the independent contractor;
- You provide the independent contractor tools and equipment and reimburse expenses just like employees; you may even follow the policies in your handbook when you manage them;
- They attend company meetings, appear on telephone lists, and outwardly appear to be an employee;
- The independent contractor manages your employees;
- An independent contractor files for unemployment or files workers comp claim.

DID YOU KNOW?

If a person receives a W2 and 1099 in the same year it can trigger an audit in some states.

Call Dawn Bremer today at 847/456-6334 to schedule your appointment---the first step in assessing your risk for misclassification. We have the expertise and experience to assess your current practices and implement practical and effective corrective plans that can help minimize your risk for litigation.

To read more about this and other valuable topics, see some of our earlier [Newsletters](#). We invite you to follow us on our new blog, [Be a Better Manager](#).

What keeps entrepreneurs up at night? Take our newest [SURVEY](#) and see how you compare on our new graphical display.

How secure are your IT systems? Take our [systems security quiz](#) to learn more.

Sincerely,

Mark

Mark Ernst
Ernst Enterprises, LLC

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