

Employee or Independent Contractor?

One change that has occurred in our employment work force is that many employers are reducing the number of employees they have, without reducing the number of people who work for them. This seeming paradox is accomplished by the use of workers who are classified as "independent contractors" or "leased employees." The concept of independent contractors is not novel to employment law. The increase in the use of such workers is.

The basic definition of an employee under employment law principles is "a worker who is subject to the employer's control or right to control, not only the work to be performed, but also the manner in which it is to be performed". An independent contractor, however, is defined as someone "controlled only as to the results of his or her work, but not as to the means or manner in which the work is accomplished".

Consider, for instance, the custodial staff of XYZ, Inc. If they are employees of XYZ, it may direct what they wear, when they report for work, how many hours they work per day, when and for how long they may take breaks, in what order they are to perform their work and what tools they are to use to perform the work. XYZ would also supply the uniforms, vacuum cleaners, buckets, mops, rags, cleaning solutions, and other supplies and equipment needed to accomplish the work. Workers would be hired and fired as decided by XYZ, unless prohibited by contract or public policy reasons. If the workers are employees, XYZ would have to contribute to Social Security and unemployment compensation on their behalf, would have to obtain workers compensation coverage for them, deduct federal, state and local taxes from their salaries, and provide health insurance and other fringe benefits, including pension and profit sharing plan contributions, in the same manner as provided for other employees.

If, instead, XYZ decided that it did not need an employee cleaning staff, it might hire a cleaning firm ("Superclean") to perform the custodial tasks. In this situation, XYZ's level of control would be much less. It could direct the tasks to be performed by Superclean, the result which it wanted and perhaps even the hours within which those tasks were to be performed. It could not, however, direct when the Superclean workers reported, when they took breaks, the number and duration of those breaks, the order in which tasks were performed, or the tools to be used to perform those tasks. Neither could XYZ hire and fire members of the custodial staff of which it disapproved, for whatever reason. The only control able to be exercised by XYZ is as to the result of the work, and not the manner

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in which performed or the people doing the performing. For this custodial staff, XYZ would pay Superclean a fee for services rendered, and would incur no employment costs or taxes.

The decision of whether certain jobs should be performed by employees or independent contractors becomes, for businesses, a weighing of two factors: 1) the need to control the manner of performing the work; and 2) the need to reduce the cost of performing the work. Once a business makes the determination, however, its choice is viewed with interest by a number of governmental entities. The agency most frequently involved is the Internal Revenue Service, which must determine whether all employment related taxes have been properly withheld by the business and paid by the worker. The Department of Labor also becomes involved when a worker claims employment status, as opposed to independent contractor status, and demands overtime and other statutory rights to which only employees are entitled.

In resolving the dispute between employees and independent contractors, the IRS has developed a twenty (20) factor test which is also used, entirely or in part, by the Department of Labor, the courts and other entities which must analyze the business/worker relationship.

The twenty factors all revolve around the issue of control. For instance, the first factor is instruction, and the more instructions with which the worker must comply, the more likely it is that he or she is an employee. Similarly, if the business provides "on the job training" it is more likely that the worker is an employee. If the business has engaged a particular worker for an extended duration of time, or if the work performed is a necessary and integral part of the business, then it is more likely that those performing the work are employees. If, however, the worker is free to serve a number of businesses, is paid on a per job basis, is required to supply his or her own tools and equipment, and can experience a profit or loss with the job, it is more likely that the worker is an independent contractor.

As noted above, the number of businesses (including some law and accounting firms hiring lawyers and accountants on a per job basis) opting to engage independent contractors rather than employees is ever increasing as a means of reducing labor costs. If you believe you have been incorrectly characterized as an independent contractor and denied your employment rights, you should seek assistance from an attorney familiar with labor law issues to clarify your rights.

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