

# What's In a Name? Classifying The Independent Contractor

By Christine A. Page, Esq.

In this economic environment, it is quite tempting to turn to independent contractors rather than employees to fill in workforce gaps. There are multiple advantages to having independent contractors in lieu of employees. For example, employers do not pay benefits or contribute to unemployment and social security for independent contractors, and wage and hour laws do not apply. Also, there is greatly reduced exposure to wrongful termination and discrimination claims.

Having said that, many workers today are misclassified as independent contractors. A disgruntled "independent contractor" can challenge the classification with the EDD or Labor Commissioner, for example, and an audit by the various governmental agencies authorized to police misclassifications (e.g., IRS, FTB, EDD, DLSE, DWC) can have draconian consequences, including payment of the employer's contributions, interest, and penalties that may average 50% of the worker's compensation.

The watchword for employers today is: self-audit! Before being served with an inspection demand from a governmental agency, it is wise to examine all of your independent contractor relationships to ensure that they are legitimately receiving 1099's and not W2's. Although none of the agencies uses the exact same test, there are key elements that are common to all of them.

The essential factor in all of the tests is the right of the independent contractor to control the manner and means in which the work is performed. By definition, independent contractors are neither trained nor supervised. They should come to the job with the skill set required to perform the tasks for which they are paid. The company can be very specific about the end result—e.g., a repair of equipment or organization of business records—but cannot dictate when or how the end result is accomplished. Factors that are considered in determining whether the worker retains sufficient control include whether the worker provides his/her own tools, supplies, offices, etc., to perform the work, the level of skill required, whether the worker's duties are an integral part of the company's business, the method of payment, and the permanency of the relationship.

There are a few red flags that will stand out in any audit and should be carefully avoided:

1. Absence of a written contract (although not required and not determinative, a written contract for a fixed term establishing a non-exclusive independent contractor relationship is very helpful)
2. Reimbursement of the independent contractor's expenses

3. Provision of benefits to the independent contractor
4. Full-time work for an extended or indefinite period
5. Conversion of an existing employee to independent contractor status
6. Engagement of an independent contractor to perform the same kind of work that is performed by other employees in the business

This brief discussion does not identify all of the relevant factors and a determination of independent contractor status ultimately must be made on a case-by-case basis. Our firm can assist you in conducting a self-audit, preparing or reviewing independent contractor agreements, and providing general advice as to how to establish bona fide independent contractor relationships for your business.



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