

Employee or Independent Contractor?

By Olivia Goodkin, Esq.

What is the difference between an employee and independent contractor?

An independent contractor is retained by companies to complete a specific project. The company does not direct the method or means of job performance by an independent contractor. Usually, the independent contractor provides his or her own tools and has control over when the work is performed. The independent contractor pays for his or her expenses in performing the job, such as travel, meals and cell phones. An independent contractor is free to hire his or her own employees to assist in completing the project. An independent contractor is paid a fee, from which no payroll deductions are made.

A classic example of an independent contractor is a computer expert who is hired by a company to install new software or fix computer problems. The company does not tell the independent contractor **how** to do the job, but only what the company wants to achieve.

What are the advantages of retaining independent contractors instead of employees?

First, companies avoid paying payroll taxes---the employer portion of contributions into state disability and unemployment insurance funds, among other things. Second, independent contractors are not entitled to benefits otherwise afforded to employees, such as vacation and sick pay, contributions to pension plans, family medical leave, disability leave, military leave, and the like. Third, independent contractors cannot sue for discriminatory employment practices.

(There are breach of contract, fraud, unfair business practices and other causes of action available to address wrongful conduct.) Fourth, the cost of workers compensation insurance is reduced due to the smaller ranks of employees on payroll.

How do I determine if a worker is an independent contractor?

There is a presumption that workers are employees, but this presumption can be rebutted. Generally, the answers to the following questions will guide employers to make the right determination, but no one factor is dispositive of the outcome:

1. Does the employer have control or the right to control the worker both as to the work done and the manner and means in which it is performed?
2. Is the person who is performing services engaged in an occupation or business distinct from that of the principal? For instance, is the worker incorporated? Does the worker have his or her own employees?
3. Is the work performed a part of the regular business of the principal or alleged employer? If the work is part of the regular business, it is rare that there will be a finding of an independent contractor relationship. As an example, massage therapists would be integral to a spa's business and, therefore, it is more likely to



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be found that the therapists are employees.

4. Does the principal or worker supply the instrumentalities, tools, and the place for the person doing the work? Employers provide all the tools, equipment and uniforms; independent contractors use their own tools.
5. Does the service rendered require a special skill? If the worker is licensed in his or her field, this factor will weigh in favor of a finding of an independent contractor relationship.
6. Does the worker have an opportunity for profit or loss depending on his or her managerial skill? An independent contractor is at financial risk; an employee is not. An employee gets paid whether the employer is profitable or not.
7. Is there a required length of time for which the services are to be performed? An independent contractor is typically allowed to complete the job within his or her own time frame.
8. What is the degree of permanence of the working relationship? Obviously, if you intend to keep the worker indefinitely, the worker is going to look more like an employee.
9. What is the method of payment, whether by time or by the job? An independent contractor gets paid for the result, not for the process.
10. Do the parties believe they are creating an employer-employee relationship?

Recommendations for an independent contractor relationship.

If you believe, based on your answers to the questions above, that a worker is an independent contractor, it is helpful to have a written agreement setting forth the terms of the relationship. The agreement should include, at a minimum: (a) an acknowledgment of the nature of the relationship; (b) a statement that the independent contractor is responsible for the method of performing the work and for any workers' compensation insurance for his or her employees; (c) an agreement that the independent contractor will pay all income and other taxes arising from payment for the job; and (d) an acknowledgment that the independent contractor is not entitled to any of the benefits offered to the company's employees.

The existence of a written contract is merely a factor examined by governmental agencies and courts in deciding whether a worker is an independent contractor. Nevertheless, going through the process of negotiating and writing an agreement will help crystallize whether the worker really is an independent contractor. If he or she is, having an agreement memorializing the relationship prevents misunderstandings between the parties.

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