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Back to Basics: Employee or Independent Contractor?

Frequently, an employer will refer to a person who is obviously their employee as a “contractor”. Employers who misclassify employees as independent contractors will owe back payroll taxes and unpaid workers’ compensation and unemployment premiums. These employers may also owe unpaid overtime or minimum wages, medical expenses and unpaid leave, and could be subject to IRS penalties.

Misclassification has occurred in all industries, but construction and trucking seem to lead the way. These traditionally misclassified workers have been joined by a growing number of “on-demand” or “gig” workers (e.g., Uber and Door Dash providers.) While an argument may be made that today’s workers prefer the flexibility that being an independent contractor brings, the law has not adjusted to this reality.

With construction season coming, I thought it would be a good time to review the Independent Contractor issue. Thanks to the State of Montana’s Department of Labor for the following information:

When assessing whether a worker is an Independent Contractor or employee, the following factors are taken into consideration:

1. INSTRUCTIONS

- a. Employee: provided with instructions from the business regarding when, where and how to perform the work.
- b. Independent Contractor: decides when, where and how to accomplish the services he or she is providing.

2. TRAINING

- a. Employee: receives training directly from the employer, demonstrating that the business wants the services performed in a particular manner.
- b. Independent Contractor: receives little or no training from the business, but rather, hiring is based on pre-existing proficiency or expertise in a particular line of work.

3. SERVICES RENDERED BY THE WORKER PERSONALLY

- a. Employee: personally performs any assigned duties.
- b. Independent Contractor: free to hire employees or subcontract tasks.

4. SET HOURS OF WORK

- a. Employee: work hours established by the employer.
- b. Independent Contractor: retains the ability to set own hours.

5. REALIZATION OF PROFIT OR LOSS

- a. Employee: receives pay for time and labor only without realizing any additional gain or sharing in the risk of loss realized by the company based on the worker’s services.
- b. Independent Contractor: personally stands to gain or to lose economically based on performance of his/her services.

TIME REQUIRED

- a. Employee: usually devotes his/her employment to the business; full-time employment could prevent the worker from engaging in other gainful employment.
- b. Independent Contractor: does not necessarily work solely for one business and remains free to pursue other projects.

7. WORK ON EMPLOYER'S PREMISES

- a. Employee: performs services on the premises of the employer to the extent which the nature of the services requires the work to be done on the employer's premises. If the business has the right to compel the worker to perform services at an alternative specified location, then the level of control remains the same.
- b. Independent Contractor: chooses where to perform the services.

8. ORDER OR SEQUENCE OF THE WORK

- a. Employee: required to perform services in the order set by the employer.
- b. Independent Contractor: retains the option of deciding the sequence in which the work is performed.

9. CONTINUING RELATIONSHIP

- a. Employee: a continuing, non-sporadic relationship exists between the business and the worker.
- b. Independent Contractor: free to perform a service and then move on to other projects.

10. HIRING, SUPERVISING AND PAYING ASSISTANTS

- a. Employee: may hire assistants only under the direction of the employer.
- b. Independent Contractor: free to hire, supervise and pay additional assistants or subcontractors as necessary.

11. INTEGRATION OF THE WORKER'S SERVICES

- a. Employee: services are integrated into the daily success and operation of the business.
- b. Independent Contractor: services provided do not substantially affect the overall success of the business.

12. ORAL OR WRITTEN REPORTS

- a. Employee: submits regular reports to the employer for whom the services are being performed.
- b. Independent Contractor: accountable for end results only and not necessarily required to provide regular reports.

Contracts with Independent Contractors may require compliance with safety standards.

13. PAYMENT METHOD

- a. Employee: paid by the hour, week or month.
- b. Independent Contractor: paid by the project or on a straight commission.

14. PAYMENT OF BUSINESS EXPENSES

- a. Employee: the business usually pays expenses for the worker.
- b. Independent Contractor: pays for own business and traveling expenses.

15. FURNISHING OF TOOLS AND MATERIAL

- a. Employee: receives tools and equipment from the employer.
- b. Independent Contractor: provides tools, equipment and materials.

16. SIGNIFICANT INVESTMENT

- a. Employee: depends on the continued success of the business without taking on any investment in the working facilities or equipment.
- b. Independent Contractor: invests in facilities or equipment used to perform any services, showing that the worker is in business for himself/herself.

17. WORKING FOR MORE THAN ONE BUSINESS

- a. Employee: restricted, either explicitly or effectively, from providing services to several businesses at once.
- b. Independent Contractor: free to provide services to multiple, unrelated businesses at the same time.

18. AVAILABILITY OF SERVICE TO THE GENERAL PUBLIC

- a. Employee: provides services to only one business.
- b. Independent Contractor: offers services openly to the general public.

19. RIGHT TO FIRE THE WORKER

- a. Employee: employer maintains the discretion to discharge a worker.
- b. Independent Contractor: may not be terminated as long as the performance proceeds according to the agreed-upon terms.

20. WORKER'S RIGHT TO QUIT

- a. Employee: generally has the right to terminate the relationship with the business at any time.
- b. Independent Contractor: must fulfill any contractual obligations or else risk liability for breach.

For more information about the misclassification (or proper classification) of employees, go to <https://www.dol.gov/agencies/whd/flsa/misclassification>.