

Ask the Lawyer

Is My Independent Contractor **REALLY** An Employee?

by Daniel N. DeFio

Daniel DeFio is an attorney with Scolaro, Shulman, Cohen, Fetter & Burstein, P.C. in Syracuse, NY, a practice concentrating on business law with a particular emphasis on the representation of professional service companies. You may contact him at (315) 471-8111 or send e-mail to ddefio@scolaro.com

Many small businesses nowadays hire workers as independent contractors to perform services, instead of as employees. This has the effect of shifting the burden of traditional employer costs such as the employer's FICA and unemployment insurance to the independent contractor.

While this seems like a golden opportunity for employers to save on expenses, it's been my experience that many times the person does not understand that they are an independent contractor, nor do they understand the obligations they have taken on.

It is important to remember that just because the employer does not have to pay the traditional expenses associated with an employee, the independent contractors themselves are required to pay such expenses. Remember, Uncle Sam still gets his due with an independent contractor. The difference is who pays it.

In fact, my experience has been that in most cases when a business gets a notice from the state for failure to pay unemployment insurance on an "alleged" independent contractor, it is because the individual has been let go by the employer and applies for unemployment. The employer always argues that the individual was an independent contractor. But, as far as the state and Uncle Sam are concerned, what the employer says is of little consequence.

It's not enough that the employer calls the individual an independent contractor, even if in writing. What is important is how the individual fits into the 20-factor test that the Internal Revenue Service has devised to determine whether an individual is an independent contractor or an employee.

Unfortunately, the test proposed by the IRS is not conclusive. In other words, there is no direction from the IRS as to how many factors must be met in order for an employer to feel safe that they will not have a problem in the future.

Instead, it is suggested that the factors are simply viewed as points of evidence that will be taken into consideration by the IRS in determining an individual's status as an employee or independent contractor. The more control an employer has over an individual, the more likely they will be regarded as an employee. The 20-factor test is as follows:

1. A worker required to comply with others' instructions on when, where, and how to work is usually an employee.
2. Training a worker indicates that services are to be performed in a particular method.
3. Integration of a worker's services into the business operations indicates control.
4. Services to be rendered personally indicates control.
5. The right to hire, supervise, and pay assistants shows control.
6. A continuing relationship indicates an employment relationship.
7. Set hours of work for the worker indicates control.
8. Full-time work indicates control. An independent

contractor is free to work when and for whom he chooses.

9. Work performed on a business's premises suggests control.
10. Requiring work be performed in a set order indicates control.
11. A requirement that the worker submit regular or written reports indicates control.
12. Payment by the hour, week, or month indicates an employment relationship.
13. Payment of business expenses indicates an employment relationship.
14. Furnishing of tools and equipment indicates an employment relationship.
15. Investment by the worker in facilities indicates an independent contractor.
16. The ability to realize a profit or loss from services indicates an independent contractor.
17. Working for more than one firm at a time indicates an independent contractor.
18. Services available to the general public on a regular and consistent basis indicates an independent contractor.
19. The right to discharge a worker indicates an employment relationship.
20. The worker's right to terminate his relationship without liability indicates an employment relationship.

As an employer, remember that the odds are not only stacked against you in trying to prove that an individual is an independent contractor and not an employee, but that as an employer, you bear a substantial amount of the risk if the person is found to not be an independent contractor.

Small-Biz Snapshot



The following percentages reflect the change in the number of payroll jobs over a one-year period ending in September 2002:

Upstate (overall) .. +0.5%	Rochester - 1.6%
Albany/Schenectady/	Utica/Rome +0.1%
Troy +0.3%	Orange County +0.7%
Binghamton - 2.2%	New York City -2.4%
Buffalo/Niagara	Long Island 0
Falls - 0.4%	Northern NYC
Dutchess County ... - 0.1%	suburbs +0.1%
Elmira - 2.1%	New York State
Glens Falls - 0.4%	(overall) -0.8%
Syracuse - 0.1%	U.S. overall job loss -0.7%

Source: US and NYS Labor Departments