



# Assessing The Risk:

## Wage and Hour Tip Of The Week

### If it Walks Like a Duck, and Quacks Like a Duck . . . (Or, How to tell an Independent Contractor from an Employee)

**Tip: Audit your independent contractor relationships to ensure that you have properly classified the individuals as independent contractors rather than employees.**

Whether an individual is an employee or an independent contractor is a question with which employers often struggle – and often get wrong. This mistake can lead to serious consequences, including federal and state agency audits and class action lawsuits. Misclassified independent contractors can present significant exposure for employers.

With that in mind, how do you determine whether your independent contractors are properly classified? First, simply declaring that an individual is an independent contractor (even with an agreement!) does not make it so. To determine whether an individual is properly classified as an independent contractor under federal law, courts and the DOL will look at the economic reality of the relationship between the business and the contractor. In doing so, they consider the following factors:

- the nature and degree of the employer’s control as to the manner in which the work is to be performed;
- the employee’s opportunity for profit or loss depending upon his managerial skill;
- the employee’s investment in equipment or materials required for his task, or his employment of workers;
- whether the service rendered requires a special skill;
- the degree of permanency and duration of the working relationship; and
- the extent to which the service rendered is an integral part of the alleged employer’s business.

No one factor is controlling – the specific circumstances of the relationship at issue are key, and each case is unique. What does this mean for you? While there is no foolproof way to determine whether an individual is an employee or independent contractor, below are a few questions you should ask before designating an individual as an independent contractor.

*Who controls the details of the work?* You should ensure that the independent contractor determines when and how to perform his work or provide services with little direction from you.

*Is the work entrepreneurial in nature?* In other words, does the independent contractor have his own business and provide services to other businesses?

*Are the services provided at the core of your business?* Businesses sometimes use independent contractors to perform duties that some of their employees also perform. Instead, you should ensure that your independent contractors provide services that are incidental (even if important) to your core business, rather than performing the same duties as some of your employees.

*Who provides the tools?* When possible, you should request that your independent contractors utilize their own tools and instruments.

*What is the individual's length of service?* Businesses sometimes enter into agreements with independent contractors for an indefinite period of time or for a period longer than a year. Such agreements are more likely to be challenged by a worker or the DOL. To reduce the risk of a challenge, consider contracting with the individual for a defined period of time based on the services provided.

*How is the individual paid?* Businesses sometimes choose to pay independent contractors in a manner that resembles wages, such as an hourly rate. Instead, you should ensure that amounts paid are directly linked to the services rendered, rather than to the hours the contractor works. For example, you might pay a contractor per job, project, or by the piece.

If the totality of the circumstances, taking into account the answers to these questions, suggest that an individual does the same work as an employee, is monitored like an employee, and is paid like an employee, then the individual may be an employee. As explained above, if that is the case, an independent contractor agreement cannot save the day.

You should diligently re-visit your classification of individuals as independent contractors on a periodic basis. In addition to reviewing the criteria above for eligibility under federal law, you should be sure to evaluate whether an individual is properly classified as an independent contractor under state law in states where the requirements differ from those of the FLSA, particularly since some states have independent contractor laws that are even more stringent than federal law.

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**Seyfarth Shaw LLP Tip of the Week | August 7 2013**

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