

EMPLOYMENT LAW: EMPLOYER MYTHS, MISTAKES & MISUNDERSTANDINGS

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[This article is one of a series of articles intended to identify and discuss some of the mistakes employers make and misunderstandings that employers have with respect to employment laws. It is not intended, and should not be construed, as legal advice.]

by Brad Adams¹

“If I have entered into an independent contractor agreement with a worker and issue the worker an IRS Form 1099, then the worker is an independent contractor under the law.”

A surprising number of employers wrongly assume that if they simply have an independent contractor agreement with a worker, the worker necessarily *is* an independent contractor and not an employee under the law. Not only is this assumption incorrect, but an employer who operates under this assumption may be doing so at a significant risk. While an independent contractor agreement is important in defining the nature and parameters of the working relationship, *it is not determinative* of whether a worker is an independent contractor under the law. Instead, courts and federal and state administrative agencies consider a variety of factors, usually as part of a multi-factor test, in determining whether a worker is an independent contractor or an employee. The test or factors applied may depend on the court or agency involved, the jurisdiction, and the law at issue. Further, it should be noted that these tests can vary markedly, even within jurisdictions. Consequently, it is not inconceivable that a worker could be deemed an independent contractor under one law and an employee under another law.

The variety of laws and tests can make determining whether a worker is truly an independent contractor a daunting undertaking. (It certainly would be much easier if independent contractor agreements were dispositive of a worker’s status as an independent contractor). While analysis of the various tests and factors that may be considered is beyond the scope of this article, following are some potential red flags that could suggest that your worker may not qualify as an independent contractor:

- You control or retain the right to control how the worker performs the work;
- The worker reports to a manager or supervisor who is your employee;
- The worker works exclusively (or almost exclusively) for you;
- The worker does not hold himself or herself out as providing services to the public (e.g., the worker does not have a website, advertise or have a business listing);
- You require the worker to personally perform his or her work for you;
- You pay the worker by the hour rather than by the project or job;
- You require the worker to attend company-provided training and/or meetings;
- You require the worker to submit reports or account for how his or her time is spent;
- You provide the worker with tools, equipment and/or materials used to perform the work;

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- The worker performs largely unskilled work;
- You discipline the worker or reserve the right to do so;
- You evaluate the worker's performance; or
- The work performed by the worker is part of your core business.

Failure to go beyond your independent contractor agreement and give broader consideration to the true nature of your company's relationship with its workers can have significant legal consequences, in large part due to the variety of employment-related laws that are applicable if an employment relationship exists. For example, misclassification of a worker under the Fair Labor Standards Act ("FLSA") can result in employer liability for back pay for failure to meet minimum wage and overtime requirements. In addition, employers may be liable for an equal amount in liquidated damages as well as attorneys' fees and costs. Civil penalties up to \$1,000.00 per violation can also be imposed by the Department of Labor Wage and Hour Division for what are deemed willful violations of the FLSA. And the FLSA is merely one law that can be triggered by worker misclassification. Damages, penalties, fees and/or costs based on liability of worker misclassification also may be incurred under a variety of other laws such as the Internal Revenue Code, state wage and hour laws, state tax laws, state unemployment compensation and workers' compensation laws and the Immigration Control and Reform Act. Further, misclassification of a worker as an independent contractor may result in the denial of certain statutory rights such as those afforded under the Family Medical Leave Act (and thereby result in employer liability).

In sum, worker misclassification can result in significant legal consequences under a variety of employment and other laws. Consequently, while independent contractor agreements are important, for some employers, they provide a false sense of security that may result in costly consequences. Independent contractor agreements should not be relied upon as determinative of whether a worker is properly classified as an independent contractor. Instead, employers should carefully and thoroughly examine the true nature of their relationship with any worker who is engaged as an independent contractor and consider applicable laws with respect to how worker classification is determined. By doing so, employers can assess whether changes are needed either with respect to their classification of their workers or to their practices as they relate to certain workers.