
Employee or Independent Contractor?

Be Sure You Know the Difference and the Impact It Has on Your Workers' Comp Responsibilities.

What makes someone an employee or an independent contractor? Is there a single determining factor one can point to for certainty? Calling someone an independent contractor does not necessarily make it true. Conversely, giving someone a 1099 form to file their own taxes does not mean he or she is not an employee. The IRS has developed a list of twenty factors to help in proper classification. Most of these factors boil down to one common factor: control. Of course, nothing is ever this simple. To further muddy the waters, each state has its own workers' compensation statutes that address who is an employee. In the end, the burden of proof most often falls upon the employer or hirer, not the employee or independent contractor.

An employer-employee relationship often exists when the person for whom services are performed has the right to control and direct the person completing the work. Generally, common law would indicate that in an employer-employee relationship it is not necessary for the employer to actually direct or control the method of work, simply that the employer has the power to do so. An independent contractor is able to use his or her own judgment in selecting the method and time frame of the work while an employee will have guidance or specific instructions from the employer. Even though an independent contractor and employee can be fired, usually the independent contractor can be fired only for a breach of contract.

Once the employer has made a determination on the worker's status, several key factors should be considered. One of these factors is workers' compensation insurance. Generally speaking, the employer must provide workers' compensation coverage for the employee and not the independent contractor; however, some states such as North Carolina and Virginia require an employer to cover the workers' compensation for employees of the uninsured independent contractor. If an insurance company is paying or has the possibility of paying benefits to injured workers of the independent contractor, the insurance company will certainly charge for the exposure at audit time.

In order to avoid increased premiums and noncompliance with workers' compensation statutes, the employer should take several risk management steps. First, the employer should use a contract that has been drafted by legal counsel and includes a hold harmless agreement from the independent contractor. In addition, the contract should set clear provisions on tax responsibility, the elements of control, and workers' compensation insurance. No work should be performed without a certificate of insurance in the name of the independent contractor with coverage and limits at least equal to that of the employer, including workers' compensation insurance.

With every state having its own statutes and each jurisdiction interpreting a given case in light of the specific circumstances, it becomes more difficult to determine when an employer-employee relationship exists. With state penalties and possible workers' compensation premium audits, it is important that employers make informed decisions. Many employers have operations all over the country and abroad making them subject to multiple jurisdiction statutes. To ensure full compliance with workers' compensation statutes in all jurisdictions, please consult with your attorney.

Your Scott Risk Management Advisor can assist you with solutions.

– *Dustin DeJarnette, CIC and ARM
Commercial Compliance Specialist*