

**Employee Or Not An Employee...**

by Susan M. Zeamer, Esq.

It's not exactly William Shakespeare, but it is an age-old question that seems to resurface cyclically. And now seems to be one of those periods of "resurfacing", as the number of inquiries we have received in this area is up once again. The basis for the calls? More often than not, they are prompted by an investigation by various agencies, such as the U.S. Department of Labor ("DOL"), the Commonwealth of Pennsylvania's Department of Labor & Industry ("L&I") and the Unemployment Compensation Bureau ("UCB"), who are attempting to determine whether someone treated by a company as an independent contractor (or subcontractor) is actually an employee. Although not a new topic, a refresher on the basics may be beneficial.

When determining whether an individual is an employee of the company or truly an independent contractor, an agency will look for indicators of the control the company has over that individual, as well as the work the individual is to perform. Generally speaking, an employer-employee relationship exists when the company – the entity (or person) for whom the work is performed – has the right to control and direct the individual who is performing the work. This right to "control and direct" extends, not only to the result to be accomplished through the work performed, but also to the details of, and manner by which the work is performed to achieve the desired result. Importantly, the company does not have to actually control or direct the detail and manner by which the work is performed. Instead, what is determinative is whether the company has the right – not whether it acts on that right – to control and direct.

An independent contractor will have the exclusive control over the details of the work and the manner in which he or she performs the work contracted for, and is responsible only for the result or end product. An employee, on the other hand, may be told not only what to do, with regard to work assignments, but also how to do it.

**Factors:**

So how will these agencies make the determination between employee and independent contractor? Several factors are considered and weighed, some of which are more important and weighed more heavily than others. The factors are as follows:

1. Details of Work Performance: The "details" include set hours and days for work; a requirement of full time versus part time, or vice versa; and the order or sequence the work is to be performed.

Consider whether the individual is able to determine his or her own work schedule – hours, work days, work weeks? Is the individual able to determine the hours required to complete the task in question? Does the individual have the ability or discretion to hire others to assist in performing the task? If the answers to these questions is no, then this factor weighs more favorably in finding an employment relationship; if yes, then this factor weighs toward the finding of independent contractor.

2. Compensation: Compensation involves not only the manner and timing that the individual in question is paid, but also whether there are any withholdings from that pay. Benefits, too, would be a consideration under this factor.

In weighing this factor, considerations such as payment by the hour, week, or month, as well as whether payroll and other taxes are withheld from such payment, generally favor the finding of an employee; whereas, payment by the job or on a straight commission basis favors the finding of an independent contractor. If the company provides health benefits, retirement, or other benefits to the individual, as you may imagine, such considerations would weigh toward a finding of an employee.

3. Expenses, Tools, Licenses and Other Equipment: Payment of an individual's business and travel expenses, the company providing the tools necessary to complete the work, and payment for obtaining necessary licenses and maintaining those licenses are all indicators that the relationship between the individual and the company is that of employer-employee, as opposed to independent contractor.

4. Duration of the Relationship: A continuing relationship between the individual and the company is indicative of an employer-employee relationship. The longer the relationship, the more likely the individual will be regarded as an employee.

5. Structure of the Position: For this factor, the question is whether the work performed is a necessary and integral part of the company's business. The more integral the work is to the business, the more control the company will want to exert. Therefore, the more necessary and integral the work, the more this factor weighs toward finding an employer-employee relationship.

6. Additional Assignments: Here, an investigating agency will look to whether the company has the right to assign additional tasks or projects to the individual, especially if the company may do so without the need for a new contract or contractual form, such as a Change Order. If the company has the right to assign additional work, the more likely the individual will be considered an employee.

7. Ability to Provide Services to Others in the Industry: Is the individual restricted by the company from making his or her services available to others, whether other businesses in the industry or the public in general? If so, the restriction weighs in favor of finding an employer-employee relationship.

In making the determination between employee and independent contractor, the investigating agency or the courts, should it come to that, will look at "the totality of the circumstances". In other words, they will look at all of these factors together and, based upon the outcome of all, determine the individual's status.

### **Impact on ABC Members**

First and foremost, an incorrect designation can prove costly. For instance, let's say your company designates an individual as an independent contractor ("IC"). The IC completes a project by working 60-hour weeks. The DOL investigates the designation and determines that the individual should have been classified as an employee.

There are a number of issues involved here but, as one example, your company will be cited for violating the Fair Labor Standards Act ("FLSA") for failing to pay the individual overtime for each of the weeks he or she worked over 40 hours. Not only will you owe the overtime, plus additional charges for the late payment, but you will also be assessed penalties.

Let's change the example so that the UCB is conducting the investigation. This time the consideration is whether the company had adequate unemployment compensation insurance. If it is determined that individuals designated as ICs should have actually been employees, in addition to making the required payments toward unemployment compensation, the company will also suffer fines and/or penalties.

If you find yourself the subject of such investigations, contact your legal advisor immediately. There may be ways to avoid an adverse determination or, at the very least, reduce the impact, if one cannot be avoided all together.

Secondly, a company can and should put these factors to use proactively. Knowing the factors that will be considered, with proper legal guidance, a company can set up an appropriate independent contractor relationship that will withstand future administrative audits.

*This article is not intended to be legal advice, but should be considered general information. Particular questions should be directed to legal counsel.*

© Copyright 2008 Harmon & Davies, P.C.