

Employee or Independent Contractor?

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A hot issue with many small businesses is whether people they hire to assist them are employees or independent or sub contractors. Small business owners are often on a tight budget and have little time to spend dealing with payroll and employment issues so they opt to hire people and improperly designate them as independent or sub contractors, giving them a 1099 at the end of the year. While this may save time and money initially, this can become a costly problem in the future.

What many small-business owners do not understand is simply designating someone as an independent contractor does not make them an independent contractor in the eyes of the law. So, when is an independent contractor or a subcontractor actually an employee? From a legal perspective, an employee is an individual for whom the details of their work are controlled by the person who hires them (employer). As a general rule, an independent contractor is someone who is hired to undertake a specific project but can choose the method of accomplishing their task. For many years Kentucky courts have looked at a variety of factors to determine whether an individual is an employee or an independent contractor. These factors include:

- (a) the extent of control which, by the agreement, the master (boss/employer) may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business (Do they have their own company?);
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer of the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer; and
- (i) whether or not the parties believe they are creating the relationship of master and servant.

See *Brock v. Pilot Corp.*, 234 S.W.3d 234 (Ky.App. 2007); *Sam Horne Motor & Implement Co. v. Gregg*, 279 S.W.2d 755, 757 (Ky. 1985); and *Ratliff v. Redmon, Ky.*, 396 S.W.2d 320

(1965).

The extent of control you have over the details of the work being performed; whether you provide the supplies and tools for the job and whether the individual is paid by the job or the hour, are perhaps the three most significant of the above factors. Generally, an independent or sub contractor has their own business, is given the project with a completion date and the contractor decides how to complete the project on time. They set their own hours, work either where they want or if the work is required to be performed at a certain location they schedule the time that they can come to the project site. Usually, they have other jobs, projects and other companies for whom they are doing work. On the other hand, an employee may also be working on a project; but their work hours are controlled by the employer, the tools and equipment are most often provided by the employer. Other rules are often imposed by the employer. For example, when a break may be taken, when the individual can take off work or how the work is performed. Take for example a builder who needs to have a building framed. In some circumstances, the framing can be done by an employee or an independent or sub contractor. Compare the following:

When **Builder A** needs to frame a building, he generally hires the same individuals, he tells them where the job site is and when to be there, the builder provides the wood and other supplies, the individuals use the builder's tools and equipment and the builder directs the details of the framing. The framers are closely supervised and the builder specifies when they take their lunch break and how long and when they take other breaks during the day. The builder either pays them by the day, weekly, biweekly or monthly for the hours they work. Even though the builder sends them a 1099 and has them agree that they are independent or sub contractors, these individuals are really employees. They may be temporary or part-time but they are not, true independent contractors.

On the other hand, when **Builder B** needs to frame a building, he contracts with a framer who has his own employees, uses their own equipment and supplies. The contractor is given a completion date, the plans and specs for the building and usually purchases the wood and other supplies needed to complete the job. Payment is a set amount for the project and is paid as specified in the contract, usually in installments based on a percentage of work completed or at the end of the project. The contractor is not paid by the number of hours worked. This is a true independent or sub contractor situation.

No one factor is determinative and the courts and public agencies look at the total circumstances. For example, you may hire an accountant to do your tax returns, a lawyer to give you legal advice on an employment termination or an IT specialist to design your website. You pay each of these by the hour but they are hired for a specific project, have their own business and other clients. In this situation, they would not be employees. The part-time framer may work for other companies as work is available but this does not make him an independent contractor.

Improperly designating a worker as an independent or sub contractor instead of as an employee can cost the business owner far more money than they would have spent if they had hired a payroll service and paid the worker as an employee. Tax penalties,

unemployment and worker's compensation liabilities are just a few of the costly problems that can arise.

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