

## Independent Contractor or Employee?

Many New York business owners and employers are currently facing an increasing amount of pressure from the New York State Department of Labor (DOL) to comply with New York labor laws. Misclassifying a worker as a self-employed independent contractor as opposed to an employee, may be very costly.

The following fact pattern highlights a common trend. A company hires an individual and classifies them as a self-employed independent contractor, paid pursuant to NY tax form 1099. The individual signs a contract stating that he/she understands that he/she is an independent contractor, and agrees to perform the services as such. Everyone is happy. Two years into the relationship, however, a down-turn occurs and the individual is released by the company. The individual, naturally, applies for unemployment benefits with the DOL. The DOL, having no record of the individual as an employee of the company (because the individual was paid as a self employed 1099 worker, and not as a W2 employee), contacts the company, and requests audits of all of the company's books and records. A few months down the road, and a few thousand dollars of legal fees later, the company has to back pay unemployment insurance, worker's compensation insurance, and other government fees and penalties on behalf of the individual and all others similarly situated.

Many unsuspecting company owners are finding themselves in the predicament similar to the one described above simply because they are not aware of the consequences resulting from an incorrect worker classification as an "independent contractor" as opposed to an "employee." A misclassification by the employer may result in paying all previously-unpaid worker's compensation insurance, and penalties as high as \$2,000 for every 10 days of non-compliance. Additionally, paying all previously-unpaid unemployment insurance may also be required, plus penalties and interest. The DOL often requires audits of company books and records going back up to six years, which can be extremely costly and burdensome, especially for small businesses.

The "employee versus independent contractor" determination is factually based and is reviewed on a case by case basis. Generally, the ultimate concern in determining whether an individual is an independent contractor is whether as a matter of economic reality, the individual is in business for themselves; otherwise, the worker is an employee. The more *supervision*, *direction*, and *control* that a company has over an individual, the more likely that that individual will be deemed an employee. The following are some factors, albeit not all, which tend to indicate an employee/employer relationship:

- Control over the activities (full-time services, controlling work hours, or requiring permission for time off);
- Instructing as to when, where, and how to do the job;
- Direct supervision over the services performed;
- Providing facilities, equipment, tools, or supplies for the performance of the services;
- The employer setting the rate and method of pay;
- Reimbursing business or travel expenses;
- Providing fringe benefits, and requiring mandatory training;
- Requiring services to be rendered personally;

- Requiring oral or written reports;
- Services performed are an integral part of the business, and performed continually;
- Requiring display of identification of the employer; and
- Restricting the individual from performing services for competitive businesses.

The following are some factors, albeit not all, which tend to indicate an independent contractor relationship:

- The individual is an established business, generally with her own media advertising, commercial telephone listing, business cards, business stationery and billheads, maintaining own establishment, etc.;
- The individual uses her own tools and equipment;
- Assumption of the risk for profit or loss in providing services;
- Freedom to establish own hours of work and to schedule own activities;
- No required attendance at meetings or training sessions or oral or written reports;
- Freedom to provide services for other businesses, competitive or non-competitive.

It should be noted that each division of the DOL is independent of each other, and each may make its own interpretation of the “employee v. independent contractor” determination. For example, it is possible for the Unemployment Insurance Board to make one determination, and the Worker’s Compensation Board to make a conflicting determination. The best way to avoid determination issues and inconsistencies is to evaluate the relationship between the employer and a worker early, and often.

In addition to the above, employers should be aware of the following little-known, but highly important information:

- An internal review of self-employed independent contractor relationships will provide valuable information regarding potential DOL liability, and will help to avoid penalties and interest arising from future DOL determinations.
- The DOL bases its determination on the actual facts of how the services are performed, regardless of any written agreement, or waiver by the worker.
- An individual classified as an independent contractor pursuant to a written agreement does not waive her rights to seek benefits generally applicable to employees, even where expressly stated in writing, if the DOL determines that the individual is an employee.
- Any claim for unemployment benefits by a worker classified as an independent contractor may spark a full audit by the DOL of a company’s books and records to find other similar workers which may have been misclassified by the employer

We urge employers to evaluate the factual basis of all independent contractor relationships early and often to avoid any liability to the DOL. Should you have any questions resulting from any of the above information, please do not hesitate to contact us.