

Employee vs. Independent Contractor: Are You Compliant?

It is very common for small and mid-sized businesses to want to hire people as independent contractors. Many employers see the cost-saving value of not paying benefits, taxes, etc. However, most employers do not realize there are both state and federal rules that are important for to know. The misclassification of employees as independent contractors presents substantial risk for employers. The Department of Labor (DOL) has launched their "Misclassification Initiative," and it views misclassification as a "pervasive issue" that they take very seriously. The DOL has partnered with the IRS to reduce the incident rate of misclassification of employees. In addition, Congress equates misclassification of employees as independent contractors to payroll fraud, and it has been trying to pass the "Independent Contractor Misclassification Law."

What Does This Mean for Employers?

It is nearly impossible these days to prove that an employer has bona-fide independent contractors. Under Massachusetts law, there is a presumption that all workers are employees rather than independent contractors, and the burden is on the employer to disprove employee status, in addition, the IRS has strict guidelines regarding who can be classified as an independent contractor. The Commonwealth's wage laws require businesses to meet a strict three-part test to overcome this presumption. Recent amendments to the Massachusetts law make the test essentially impossible to meet for a company with workers providing services that are within the company's usual course of business. The amendments also broaden the law's applicability, and increase the penalties for noncompliance. A determination that a company misclassified employees as independent contractors can have serious consequences both for the company and for those determined to be "responsible persons."

Rule of Thumb

The "rule of thumb" is that if the employer retains any control over the conditions of the employment relationship (where and when the work is performed, how the work is performed, etc.) this is an employee/employer relationship and will most certainly not pass for an independent contractor. If the independent contractor meets all of the state resting requirements, then the employer needs to next determine if they meet the federal requirements (IRS regulations) and case law that interprets these guidelines and regulations that would impact your analysis.

Key Points and Next Steps

If your business utilizes independent contractors we strongly recommend that you conduct a self-audit utilizing the state and federal resources and testing requirements. If you determine that your independent contractors are classified properly:

- The company should have a W-9 on file for each contractor.
- W-9's should be gathered at the start of the contract and not at the end of the year.
- The IRS guidelines state that if a W-9 is not on file the company should be withholding a standard 28% in backup withholdings.
- Contractors should be invoicing for all agreed upon work and the company should only pay based off invoices.
- We strongly recommend having a contract on file for all independent contractors, reviewed by your employment attorney.



For Massachusetts Independent Contractor/Misclassification Law [click here](#).

For IRS Determination and Testing [click here](#).

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