

INDEPENDENT CONTRACTOR VS. EMPLOYEE?

INTRODUCTION

A PT may opt to be an independent contractor rather than an employee because of the freedom such status confers to accept or reject work, and because independent contractors can deduct their business expenses on their tax returns.

As a clinic owner, you may choose to hire an independent contractor rather than paying an employee to fill the same role because independent contractors have no claim to most employee benefits, are not subject to withholding requirements, and do not require employer payment of Social Security, Medicare, and unemployment taxes.

However, keep in mind that the label "independent contractor" in a written employment contract is not binding on courts or government agencies. Often government agencies and courts use different criteria to determine whether an individual is an independent contractor or employee.

Independent contractor agreements should not be signed without advice from legal counsel.

Below is a list of factors that various sources, such as state and government agencies, use to determine employment status. This is not an exhaustive list, and courts and government agencies frequently look to case specific factors to make a final status determination.

FACTORS MAINE USES TO DETERMINE EMPLOYMENT STATUS

1. Whether or not a contract exists for the person to perform a certain piece or kind of work at a fixed price
2. Whether or not the person employs assistants with the right to supervise their activities
3. Whether or not the person has an obligation to furnish any necessary tools, supplies and materials
4. Whether or not the person has the right to control the progress of the work, except as to the final results
5. Whether or not the person's business or occupation is typically of an independent nature
7. The amount of time for which the person is employed
8. The method of payment, whether by time or by the job

RESTATEMENT 2ND OF AGENCY FACTORS TO DETERMINE EMPLOYMENT STATUS

1. The extent of control which, by agreement, the employer may exercise over the details of the work
2. Whether or not the worker is engaged in a distinct occupation or business
3. 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
4. The skill required in the particular occupation
5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work
6. The length of time for which the person is employed
7. The method of payment, whether by the time or by the job
8. Whether or not the work is part of the regular business of the employer
9. Whether or not the parties believe they are creating the relation of employer employee
10. Whether the principal is or is not a business

IRS FACTORS TO DETERMINE EMPLOYMENT STATUS

The IRS uses factors in which it assesses the degree of control the company exercises over the way the work is performed by the independent contractor. If the employer exercises too much control, the worker is deemed to be an employee. A similar test is used in most states to determine status under workers' compensation laws.

The so called "economic realities test" or a hybrid of the right-to-control and economic realities test is often used by courts to determine independent contractor status in other circumstances.

BEHAVIORAL CONTROL

1. Does the worker have to comply with your instructions on when, where, or how to work?
2. Do you provide the worker with your own training materials?
3. Do you require the worker to personally perform or can the worker substitute another's services without your knowledge?
4. Do you hire, supervise, and pay the worker's assistants?
5. Do you require the worker to work a set number of hours?
6. Do you require the worker to work on a substantially full-time basis or is the worker free to work when he or she chooses?
7. Is the worker required to perform his or her services on your premises?
8. Do you furnish tools and materials to the worker?
9. Is the worker required to submit regular reports to you?

FINANCIAL CONTROL

1. Do you pay the worker by the hour, week or month?
2. Do you reimburse the worker for work-related travel?
3. Does the worker have a significant investment in the facilities they use in the course of performing their services?
4. Is the worker's service available to the general public?
5. Is the worker working for more than one employer?

RELATIONSHIP

1. Do you have the right to discharge the worker at will?
2. Is the worker's service significantly integrated with your business, in that your success depends on the performance of the worker's service?
3. Can the worker terminate at will without being liable for breach of contract?

FACTORS ILLINOIS USES TO DETERMINE EMPLOYMENT STATUS

ILLINOIS UNEMPLOYMENT INSURANCE ACT (ABC TEST)

A. FREE FROM CONTROL AND DIRECTION

1. Does the employer issue assignments or schedule work, set quotas or time requirements?
2. Does the employer have the right to change the methods used by the worker in performing his or her services?
3. Does the employer require the worker to follow a routine or schedule?
4. Does the employer require the worker to report to a specific location and/or at regular intervals?
5. Does the employer require the worker to furnish a record of his or her time to the employer?
6. Does the employer require the worker to perform services a specific number of hours per day or per week?
7. Does the employer engage the worker on a permanent basis?
8. Does the employer reimburse the worker for expenses incurred?
9. Is the worker eligible for a pension, a bonus, paid vacation, or sick pay?
10. Does the employer unit carry workers' compensation insurance on the worker?
11. Does the worker deduct Social Security tax from eh worker's compensation?
12. Does the employer report the worker's income to the IRS on a W-2?
13. Does the employer furnish the worker with materials and supplies, tools or equipment?
14. Does the employer provide the worker with transportation, samples, a drawing account, business cards, an expense account or order blanks?
15. Does the employer set the price and credit terms for the products or services?
16. Does the employer have a right to discharge?
17. Does the employer require attendance at meetings or training courses?
18. Does the employer have the right to appoint the individual's supervisors?
19. Does the employer guarantee the product or services performed?

B. OUTSIDE THE USUAL COURSE OF BUSINESS OR OUTSIDE THE PLACE OF BUSINESS

1. The second requirement of the ABC test is satisfied if the service is either outside the usual course of business of the employer or performed outside its place of business.
2. Services which merely render the place of business more pleasant or are not necessary to the employing unit's business are outside the usual course of business.
example: the services of a window washer engaged by an employer whose business is selling woolens are outside the usual course of the business of the employer.

C. ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION OR BUSINESS

1. Is the worker's interests in the business subject to cancellation or destruction upon severance of the relationship?
2. Does the worker have an investment of capital and/or own the capital goods of the business enterprise?
3. Does the individual gain the profits and bear the losses of the business?
4. Does the worker make his or her services available to the general public or the business community on a continuing basis?
5. Does the worker induce the his or her services on a Federal Income Tax Schedule as an independent business or profession?
6. Does the worker perform services for the employer under his or her own business name?
7. Does the worker have an independent shop or office?
8. Does the employer represent the individual as an employee of the firm to its customers?
9. Does the worker hire his or her own employees, without the employer's approval?
10. Does the worker have an account number with the IDES and report the ages of his or her workers quarterly to the IDES?
11. Does the worker have the right to perform similar services for others on whatever basis he or she chooses?
12. Does the worker maintain a business listing in the telephone directory or in appropriate trade journals?
13. If the services require a license, has the worker obtained and paid for the license in his or her name?

WORKERS COMPENSATION

It is always important to check your state's workers compensation laws. For example, unlike most states, independent contractors in Illinois who do not have their own workers' compensation coverage are treated the same as direct employees. Thus they will be treated as employees for workers compensation purposes if they are injured in the course of their work.

Whereas, in other states, coverage is strictly limited to those having the status of employee, as opposed to an independent contractor.

COURTS AND THE DEPARTMENT OF LABOR

The Department of Labor and the U.S. Supreme Court use substantially the same factors for determining independent contractor status. However, the Court has repeatedly indicated that there is no single rule or test for determining independent contractor status. The court has held that it is the total activity or situation which controls. Below are the factors that the Court and DOL use to determine employment status:

1. The extent to which services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's opportunities for profit and loss.
4. the nature and degree of control by the principal.
5. The amount of the alleged contractor's investment in facilities and equipment.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.