

EMPLOYEE VS. INDEPENDENT CONTRACTOR

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Hopefully these will be some tips and best practices for employers, including community association and management companies who continue to improperly classify their workers as independent contractors. When individuals are improperly classified, it subjects the individuals or companies doing so to potential civil liability, including possible penalties.

Correctly classifying an individual as an employee or independent contractor is critical. Misclassification of an individual as an independent contractor is not only unlawful, but could subject an employer to a civil penalty in addition to potential back wages and tax penalties, among other damages. If there is an on the job injury, this becomes a huge issue as well.

Nevada defines an employee as the following:

NRS 606.050 “Employee” defined. “Employee” has the meaning ascribed to it in 42 U.S.C. § 653a(a)(2)(A).

(Added to NRS by [1997, 2345](#))

The Federal code states the following:

(2) Definitions

As used in this section:

(A) Employee

The term "employee"-

(i) means an individual who is an employee within the meaning of [chapter 24](#) of the Internal Revenue Code of 1986; and

(ii) does not include an employee of a Federal or State agency performing intelligence or counterintelligence functions, if the head of such agency has determined that reporting pursuant to paragraph (1) with respect to the employee could endanger the safety of the employee or compromise an ongoing investigation or intelligence mission.

IRS Definition:

4.23.5.3 (12-10-2013)

Independent Contractor or Employee

1. For federal tax purposes, there are two classifications of workers: a worker is either an employee or an independent contractor. This is an important issue and has the potential to change the tax responsibilities of both the taxpayer and the workers.
2. Either worker classification — independent contractor or employee — can be a valid and appropriate business choice.

Here is the link where you can dig further into their analysis: https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e647

None of the above give you any help at all, but rather refer you to the IRS code.

The most important factor in determining proper classification of works is the right to control the manner and means of accomplishing the direct result. Control asserted presumes the worker is an employee. One of the reasons directors should not be out the directing independent contractor of how they should be doing a job. The best practice is to consider the following factors before classifying an individual as an independent contractor:

- Whether the individual has control over the manner and means of the work.
- Whether the individual has the ability to work for others.
- Whether the individual is engaged in a distinct occupation or business of his or her own.
- Whether the particular work is usually done under the direction of a principal or by a specialist without supervision.
- Any special skills required for the particular occupation.
- Whether the individual supplies all tools and the place of work
- The length of time that services are to be performed.
- Method of payment
- Whether the work is performed for time or by job.
- Whether the work is part of the employer/principal's regular business.
- Whether the individual can claim a profit or suffer a loss as a result of work, aside from money earned on the job.
- Investment by the individual in equipment or materials used to perform the work.

A good example is if the association or company establishes general working hours for the individual as well as specific tasks, and the individual worker is paid based on the hours worked, that individual will likely be properly classified as an employee, not an independent contractor. Each factor mentioned above has differing degrees of weight depending on the circumstances.

The best course of action is to tread lightly when classifying workers. Associations and other businesses should exercise sound judgment and seek advice when classifying workers as independent contractors just because they don't want to deal with the tax issues.

Besides the above guidelines the below factors should be implemented when hiring an independent contractor:

- Have a written independent contractor contract/agreement.
- Make sure the worker has liability and worker's compensation insurance as required by Nevada law.
- If the worker has a license, make sure it is current and valid.
- Check the State of Nevada's Contractor Board website to look for any discipline taken against the contractor or company.
- Ask for a copy of their certificate of insurance directly from their insurance agent, not the contractor. Those certifications have been forged.
- Do not set the worker's hours and ask for invoices prior to payment of any work.
- Have the individual provide his/her own tools, equipment, materials and/or supplies to perform the work. If they ask you to provide the tools, there is danger.
- Do not provide any benefits that are provided for employees, such as paid vacation time or other similar benefits. They can work their jobs around their vacation time and shouldn't even include you in that decision.
- Do not supervise any of the independent contractor's employees or assistants.
- Do not control the manner or means of the work to be done.

If there is any question, classify the person as an employee to avoid potential liability and they can then be covered under the company's own worker's compensation policy adequately.

Very few attorney's specialize in "employee" issues. They refer people to one or two that they know vs. getting into hot water themselves. It would be smart for you to do the same if you are not sure or have issue.