

EMPLOYEE VERSUS INDEPENDENT CONTRACTOR: WHAT'S THE DIFFERENCE?

Whether a person is classified as an Employee or as an Independent Contractor will have an enormous impact on the duties and obligations of both parties to an agreement to perform work. Specifically, a person's status will determine whether liability exists, and who bears responsibility for:

- Taxes (Income, Social Security & Medicare);
- Insurance;
- Worker's Compensation;
- Unemployment payments;
- Pension or retirement benefits;
- FLSA obligations (Minimum or Overtime pay & record keeping);
- ADA requirements, if any;
- Liability for negligence;
- Leave obligations (vacation, sick, parental, etc.);
- Occupational Health and Safety; and
- Data Practices Act

Wrongful termination and/or veteran's preference issues may also come into play when a person is an employee; such issues would not exist if the person is clearly an independent contractor. Misclassification of a worker can result in penalties, fines, and/or back payment of due taxes and insurance premiums.

While situations can arise where a person's status may, at first, appear ambiguous (for example, classification of someone hired to grade town roads), the Internal Revenue Service (IRS) and the courts have determined that there are certain factors which are helpful in determining whether a person is an employee or an independent contractor. Essentially, these factors look at who controls the time and manner of the work to be performed, the financial arrangements of the parties and the actual terms of the agreement. While these are frequently reviewed simultaneously, the circumstances surrounding the work will dictate which factors are an issue and which should be given greater attention.

Control of Performance

Here, the factors considered are:

- Does the town control training or instruction?
- Who controls when the work is done – who sets the hours?
- Who controls how the work is done – is the worker supervised or required to complete reports?
- Who controls where the work is performed?
- Does the performance of the work require assistance from others, if so, who provides them?
- How long is the work to last – is it ongoing?
- Does the person work exclusively for the town, or do they also work for others?

Financial Control

Financial issues also play an important part in determining a person's status. The factors applied here are:

- Who provides the tools and equipment for performing the work?
- Is payment made upon milestones or completion or, is it on a time basis, i.e. hourly, weekly, monthly?
- Is the worker able to make a profit and at risk for loss or, are they paid the same regardless of how the job is organized and completed?
- Is there competition for the work?
- How dependent is the worker on the town for continued work?

Terms of Agreement

Of course, the parties' intentions are also factors that should be viewed in conjunction with those above. Things to consider are:

- Is there a written agreement between the town and the worker?
- What duties and obligations have the parties agreed to?
- Does the worker receive benefits?
- Can either party terminate the work relationship prior to completion of the work without liability?
- Is the work being performed a major function of the town?

In determining whether someone is an employee or an independent contractor, a town should review as many of these factors as possible. However, the IRS and the courts do not accord the same weight to each factor. Generally, the most important issue is the amount of control exercised by the town over the worker and whether the worker is free to act and make decisions independently from the town.

Should a person be determined to be an independent contractor, the town will want to verify that the independent contractor has an appropriate license, if required, and that the independent contractor has adequate insurance to protect the town in the event of any accidents or problems related to the performance of the work.