



Info sheet >>>

WAGE & HOUR LAW BASICS FOR SMALL BUSINESSES

What you need to know if you have employees

EMPLOYEES VS. INDEPENDENT CONTRACTORS

Your business is growing and you want to hire help. Do you know whether to classify your worker as an employee or an independent contractor? How do you tell the difference and why does it matter? This info sheet will review the distinctions between employees and independent contractors, common mistakes employers make, and the consequences that can arise from misclassification.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

Classifying a worker is a highly individualized process, involving a multi-factor test to determine whether the worker is an employee or an independent contractor. The question revolves around how much direction and control the employer has over the worker.

| EMPLOYEE | INDEPENDENT CONTRACTOR |
|---|---|
| <p>Generally, if an employer has a right to direct and control the worker, the worker is an employee. In an employee relationship, the employer typically chooses when, where, and how the employee performs services.</p> | <p><i>An independent contractor is in business for themselves, and offers their services to the general public.</i></p> <p>An independent contractor works free of supervision, direction, and control from the business that hired them. The hiring business may determine the <i>ends</i> of the work, but the independent contractor determines the <i>means</i>.</p> |

WHY IT MATTERS:

Employers have obligations to their employees—and to state and federal agencies on account of their employees—that they don't have to independent contractors. For example:

- Only employees are protected by state and federal minimum wage and overtime laws;
- Only employees may receive unemployment and workers' compensation benefits; and
- An employer is responsible for withholdings and contributions to income tax, Social Security, Medicare, unemployment, and other taxes on employee wages.

MISCLASSIFYING AN EMPLOYEE

It's a serious issue that could cost your company money. If found in violation, you could be ordered to pay:

- back wages, overtime and benefits owed to the employees
- penalties and interest, and
- taxes owed on both the state and federal levels.

An important note on liability >>>

Even after a business closes, business owners, founders, and equity stakeholders may be held personally liable for misclassification under state and federal law. See, e.g., Irizarry v. Catsimatidis, 722 F. 3d 99 (2d Cir. 2013).

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HOW TO DETERMINE:

The basic rule is that if the employer has the right to control the work, the worker is an employee. New York law and Federal law have different tests to determine whether a worker is an employee or an independent contractor. An employer should understand both tests as most employees are covered by state and federal law. Both tests will look at multiple factors all together; no one factor is conclusive.

| NY'S "DIRECTION AND CONTROL" TEST | FEDERAL "ECONOMIC REALITIES" TEST |
|---|--|
| <p>Factors relevant to assessing direction and control include whether the worker:</p> <ol style="list-style-type: none"> 1) worked at his own convenience; 2) was free to engage in other employment; 3) received fringe benefits; 4) was on the employer's payroll; and 5) was on a fixed schedule. <p><i>Bynog v. Cipriani Grp., 770 N.Y.S.2d 692, 694-95 (2003).</i></p> | <p>Under the "economic reality" test, the relevant factors include whether the employer:</p> <ol style="list-style-type: none"> 1) had the power to hire and fire the employee; 2) supervised and controlled employee work schedules or conditions of employment; 3) determined the rate and method of payment; and 4) maintained employment records. <p><i>Herman v. RSR Sec. Servs. Ltd., 172 F. 3d 132, 139 (2d Cir. 1999).</i></p> |

It's possible that a worker may be an employee in some circumstances and an independent contractor in others. The analysis is fact-specific.

Here is an example >>>



You hire someone to construct a barn. You agree on the price and the timeline and the specifications of the barn to be built.



If you decide the hours in which they will do the work, supervise them as they complete the work, and maintain the right to change the hours, methods, or the project itself, the worker is very likely an **employee**.



If you leave it up to them how they are going to complete the work—what hours they are working, whether they'll hire someone to work on the barn with them or for them, or if they'll take on other projects for other businesses at the same time they're working on your barn—the worker is more like an **independent contractor**.

REMEMBER: Just because a worker has specialized skills, a license to practice a trade or profession, or maintains their own tools or facilities, does not automatically make them an independent contractor. The key is the degree of supervision, direction, and control the business maintains over the worker.

COMMON MISUNDERSTANDINGS

CAN WORKERS AGREE TO BE INDEPENDENT CONTRACTORS?

Many employers have their workers sign "independent contractor agreements", assuming that the agreement settles the issue. However, even if such an agreement exists, the worker may in fact be an employee. The law defines an independent contractor, and neither an independent contractor agreement, the issuance of a 1099, nor common industry practice will change that.

Instead, what matters is whether the employer exercises direction and control (state test) over the worker, and whether the reality of the situation indicates that the worker is economically dependent on the employer (federal test).

Recap >>>

The question of whether your worker is an employee or an independent contractor is an important one for your business to answer.

Focus on the key factors of control and independence when determining how to classify a worker. >>>

In general, an **EMPLOYER-EMPLOYEE RELATIONSHIP** exists **when your business controls or has the right to control** the worker performing the services, the result of the work, and the means by which the result is accomplished.

An **INDEPENDENT CONTRACTOR RELATIONSHIP** exists **when the business has very limited supervision, direction, and control** over the worker, and the worker is not dependent on the business. An independent contractor is in business for themselves, and offers their services to the general public. They may carry their own insurance, have a physical location where they keep equipment or tools that they own, they may pay their own expenses, set their own schedule, or hire help. The hiring business may determine the result of the work, but the independent contractor determines how the work is completed.

RESOURCES

For more information about classifying workers as employees or independent contractors, see:

- [NYS Department of Labor IC](#)
- [NYS Department of Labor Misclassification of workers](#)
- [US Department of Labor IC](#)
- [US Department of Labor Misclassification](#)

PRACTICAL TIPS

If you wish to arrange an **INDEPENDENT CONTRACTOR RELATIONSHIP** with your worker, make sure to:

- Document the factors used for determining an independent contractor;
- Commit your understanding to writing and review it with your independent contractor;
- Revisit the arrangement periodically to maintain accuracy; and
- Understand your obligations: For example, have the independent contractor complete a W-9 and keep a copy in your records, keep records of your payments to them, and issue a 1099-MISC if required.

The key is to look at the entire relationship: consider the degree of direction and control over the worker, and set up your relationship to limit your control and the workers' dependence on you.

Vocabulary Tip >>>

An Independent Contractor may also be referred to as a "Freelancer" or "Consultant"



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