



Employee or Independent Contractor: Costly Pitfalls to Avoid in the Early Days

Arizona Commerce Authority Boot Camp

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The Legal Stuff

- Presentation as of March 18, 2021
- Not legal advice

Presenters

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- Mike Patterson helps businesses navigate corporate, compliance and securities matters. He has extensive experience in representing businesses in the start up phase, including evaluating opportunities and assisting with market entry strategies. He efficiently resolves legal matters by identifying key issues, focusing resources, and executing on a plan.
- Helen Holden is an experienced employment attorney who helps businesses understand how to successfully navigate the landscape of federal and state employment laws. Helen provides practical advice to management on human resource issues. She has extensive experience representing early state businesses, and has represented clients in diverse industry sectors, including construction, real estate, manufacturing, technology, health care, distribution, and the retail and service sectors.

Agenda

- Employee or Independent Contractor
 - Importance of Proper Classification (or why you care)
 - Multiple Tests (or it's more complicated than you think)
- Common Myths and Pitfalls (or Dos and Don'ts)
- Questions

Employee or Independent Contractor

Importance of Proper Classification (or why you should care)

Reason One: Everyone Else Who Cares


- White House
- Office of Federal Contract Compliance Programs (OFCCP)
- Department of Labor (DOL)
- Internal Revenue Service (IRS)
- Workers' Compensation Carriers
- State and local executive, legislative and regulatory bodies
 - Department of Revenue
 - Department of Economic Security
- Plaintiffs' attorneys

Reason #2

- Independent contractor status is defined by law, not agreement
- What does this mean for your business?

Reason #1.6 million

An official website of the United States government. [Here's how you know](#) ▾

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News Release

FEDERAL COURT ORDERS CHRISTIAN HOME HEALTHCARE TO PAY MORE THAN 500 WORKERS \$1.6M IN BACK WAGES, DAMAGES

US Labor Department finds Pittsburgh home health care agency misclassified employees

PITTSBURGH – A U.S. District Court for the Western District of Pennsylvania in Pittsburgh has issued a consent order requiring the payment of more than \$1.6 million in back wages and damages to 546 home health aides. The Pittsburgh home health care agency misclassified the aides as independent contractors and failed to pay required overtime wages in violation of the [Fair Labor Standards Act](#). The court also ordered payment of \$20,000 in civil money penalties.

The court's action follows an investigation of Christian Home Healthcare Corp., operating as Christian Home Healthcare in Pittsburgh, by the U.S. Department of Labor's Wage and Hour Division. The court ordered Christian Home Healthcare Corp. and its owner, India Christian, to pay \$812,675 in back wages and an equal amount in liquidated damages to the affected home health aides. Due to the willful nature of the violations, the court also ordered the company to pay civil money penalties.

Investigators determined that Christian Home Health Care violated the FLSA when the employer:

- Misclassified 546 home health aides as independent contractors instead of employees, and then failed to pay them overtime when they worked over 40 hours per week.
- Continued to pay some aides straight-time rates for overtime hours, even after it began to classify them correctly as employees.
- Failed to keep a record of the number of hours worked by office staff.

Multiple Tests (It's Complicated)

- Internal Revenue Service: Right to Control Test (narrowest)
- National Labor Relations Act: Common Law Agency Test (broader)
- Title VII of the Civil Rights Act of 1964: Combined Test
- Employment Retirement Income Security Act: Common Law Agency Test
- Fair Labor Standards Act: Economic Realities Test (broad)
- Many varying state laws (California and other states use ABC Test - broadest)

Arizona

- Department of Economic Security/Unemployment
 - Right to Control Test
- Arizona Minimum Wage Act
 - Economic Reality Test
- Fair Labor Standards Act (Federal Law providing for overtime)
 - Economic Reality Test

Plumber



Right to Control Test

- Does not matter whether you actually exercise control
- Services are a regular part of your business
- Services may be part time, temporary, seasonal, probationary
- Factors include performance of work for multiple entities, ability to earn profit or loss, advertise services to others, engagement in customary independent trade or profession

Economic Reality Test

- Degree of control exercised by the company over the work
- Relative investments by the company in materials and equipment
- Degree to which worker has an opportunity for profit and loss
- Skill and initiative required in performing the job
- Permanency of the relationship
- Whether the worker's service is integral part of the company's business

Common Myths and Do's and Don'ts

Myth vs. Fact

She asked to be classified that way, so it's okay.

This is factor in some tests, but it is not conclusive. Courts and agencies will reach their own conclusions, based on the legal tests.

Myth vs. Fact

We have a written agreement with him, so he's definitely an independent contractor.

Courts and agencies often disregard written agreements. Instead, they will inquire into what is actually happening on a day-to-day basis.

Myth vs. Fact

My independent contractor agreement meets the IRS test, so it is okay.

Agencies often reach different results, and a conclusion by one agency will not bind another agency or a court.

More Myths

- Hiring CFO's and other officers as independent contractors is a routine business practice, and there is nothing to worry about.
- If someone is only working for me part-time, then they are an independent contractor.
- It's okay to have my independent contractor fill out a timesheet.
- Once an independent contractor, always an independent contractor.

Avoiding Pitfalls: What to Do

- Have a written agreement that clearly defines the relationship.
 - Specify the nature of services and purpose of the engagement.
 - Specify that the company has no right or authority to control performance
 - Specify a duration, and state when the relationship will end.
 - Specify that the contractor is responsible for insurance and licenses.
- Allow the independent contractor to have a flexible schedule that focuses on completion of projects, not how the project is done.
- Allow the independent contractor authority to subcontract.
- Pay the contractor by project.

Avoiding Pitfalls: What NOT to Do

- **DO NOT** provide the contractor with:
 - Benefits
 - Tools or equipment
 - Training
 - Uniform

What NOT to Do

- Allow the contractor to represent that he is “part of” the company
- Allow the contractor to use copyrighted or trademarked materials
- Require the contractor to provide services exclusively for you
- Have employees and contractors doing the same thing
- Pay contractor as an employee (i.e., no holiday bonuses)
- Limit flexibility of contractor to perform work
 - Hours and locations
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But can I . . .

- Require independent contractor to sign a confidentiality agreement
- Require independent contractor to sign non-compete agreement

Questions?

