

BENEFITS OF USING AN INDEPENDENT CONTRACTOR

When a business prefers to hire a worker as an independent contractor, it is often because the business can avoid the responsibilities that attach to an employment relationship, most notably employment tax and wage withholding responsibilities. Additionally, when workers are treated as employees, employers may also incur costs related to pension plans, health insurance and other fringe benefits, workers' compensation and state rules relating to employment taxes and regulation of the workplace, etc.

A worker may choose to be an independent contractor because he wants to work autonomously, because he places a low value on fringe benefits (e.g., health insurance), because that is the only way the business will hire him, or for other reasons. And, from a tax perspective, a worker may prefer being classified as an independent contractor because employee business expenses are deductible only as itemized deductions and are subject to a 2% floor of adjusted gross income. In contrast, an independent contractor may be able to deduct expenses as ordinary and necessary business expenses on Schedule C (Form 1040). Also, the deductions and/or benefits available to the independent contractor under a self-employed pension (Keogh) plan might be preferable to the benefits that would be available under the pension plan (if any) of the company receiving the services.

In order for a corporation to have independent contractors, they must generally pass the IRS's 20 point test for determining whether an independent contractor is an employee. This is what the IRS looks at:

INSTRUCTION A worker required to comply with another's instructions about when, where and how to perform his duties is usually an employee.

TRAINING Training indicates the Corporation wants services performed in a particular manner, the employee is more apt to be subject to training.

INTEGRATION If the worker's services are integrated into the Corporation's operation, it generally shows that the worker is subject to direction and control.

SERVICES RENDERED PERSONALLY If a Corporation requires that services be rendered personally, the Corporation probably is interested in the methods used to accomplish the work.

HIRING, SUPERVISING, AND PAYING ASSISTANTS If a Corporation hires, supervises, and pays assistants for a worker, this factor generally shows control over the worker on the job.

CONTINUING RELATIONSHIP A continuing relationship between a Corporation and a worker indicates that an employer-employee relationship exists.

SET HOURS OF WORK When the Corporation sets the hours of work for the worker, this factor indicates control over the worker.

FULL TIME REQUIRED If a worker must work full time for a Corporation, the Corporation has control over the amount of time the worker spends working and restricts the worker from doing other gainful work. The independent contractor, is free to work when and for whom he chooses.

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WORKING ON EMPLOYER PREMISES If the work must be performed on the Corporation premises, this factor suggests control over the worker.

ORDER OR SEQUENCE SET If a worker must perform services in the order or sequence set by the Corporation, this factor shows that the Corporation is in control of the worker.

ORAL OR WRITTEN REPORTS A Corporation's requirement that a worker submit regular oral or written reports indicates a degree of control over the worker.

PAYMENT BY HOUR, WEEK, MONTH Payment by the hour, week, or month generally points to an employer-employee relationship. Payment by the job or on commission generally indicates the worker is an independent contractor.

PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES If the Corporation pays for a worker's business or traveling expenses, the worker is ordinarily an employee.

FURNISHING OF TOOLS AND MATERIALS If the Corporation furnishes tools, materials and other equipment, it tends to show the existence of an employee-employer relationship.

SIGNIFICANT INVESTMENT If a worker invests in facilities which are used by him in performing his services and that are not typically maintained by employees (like maintenance of outside office rented at fair value from an unrelated party), this factor tends to indicate the worker is an independent contractor.

REALIZATION OF PROFIT OR LOSS A worker who can realize a profit or suffer a loss as a result of his services is generally an independent contractor.

WORKING FOR MORE THAN ONE BUSINESS AT A TIME A worker who performs more than minimal services for a number of unrelated businesses at the same time indicates that the worker is an independent contractor.

MAKING SERVICE AVAILABLE TO GENERAL PUBLIC If a worker makes his services available to the general public on a regular and consistent basis this indicates an independent contractor relationship.

FIRM'S RIGHT TO DISCHARGE The right to discharge a worker is a factor indicating the worker is an employee as an independent contractor cannot be fired so long as he produces a result that meets contractual specifications.

WORKER'S RIGHT TO TERMINATE If a worker has a right to terminate his relationship with the Corporation at any time without incurring liability, this factor indicates an employer-employee relationship.

Spiegel & Utrera is ready to draft an independent contractor agreement for your corporation to use with its independent contractors. This agreement would:

- 1) Provide a description of what services the independent contractor has been engaged to perform for the Corporation.
- 2) Set the duration of the independent contractors services to the Corporation.
- 3) Establish the details of the independent contractor's relationship to the Corporation.
- 4) Require the independent contractor to maintain the confidentiality of all customer names and often business records of the Corporation.

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- 5) Provide that the independent contractor shall be responsible for its own expenditures.
- 6) Provide for indemnification of the Corporation for claims arising out of the independent contractor's acts or omissions.
- 7) Prevent the independent contractor from impairing the reputation or goodwill of the Corporation.
- 8) Prevent the independent contractor from competing against the Corporation both now and for two years after the termination of the contract.

Caveat: It is very difficult to overcome the IRS's 20 point test, but at Spiegel & Utrera, many of our clients overcome the 20 point test by insisting that their independent contractors incorporate before they begin doing business with them. After incorporation of your independent contractor, you will be contracting with a business entity rather than an individual, thus avoiding the necessity of employment tax and wage withholding.

To order your Independent Contractor's Agreement, call the Spiegel & Utrera office nearest to you.

If you have any questions, please call a Spiegel & Utrera office listed below: