

Should I hire a consultant? Key employment law questions to ask yourself

Your company is beginning to grow. You know you need to bring in more help, but you're not quite ready to hire additional employees. At this point in your business life cycle, is an independent consultant the answer?

While bringing on independent contractors or consultants may seem like the perfect and easy solution, there are some considerations every company should evaluate. Such a move could be the perfect solution as your company grows, or it could cause big headaches down the road.

Here are some key questions to ask yourself.

What is misclassification?

Misclassification occurs when a worker who should be classified as an employee is instead classified as an independent contractor.¹ Both federal and state government bodies and administrative agencies strictly enforce misclassification of employees as independent contractors. The repercussions of misclassification can be significant, including not only payment of those amounts that should have been paid if the individual had been classified as an employee – minimum and overtime back wages; unemployment insurance contributions; disability insurance contributions (in certain states); back taxes to federal, state and local authorities – but also fines, interest, penalties, attorneys' fees and other damages.

Will a written consulting agreement help?

It's a mistake to think that a written consulting agreement will shield your company from a claim of misclassification. Even the fact that the individual is issued a 1099 form rather than a W-2 form does not add much protection. Enforcement agencies routinely peel back these layers to get a closer look at the actual relationship.

What factors are used to determine whether an individual is an employee or an independent contractor?

It can be challenging to pin down which aspects of the relationship will be determinative, given the variety of tests on this topic. A good place to start is to answer two simple questions:

1. Is the independent contractor economically dependent on your company?
2. Does your company exert or want to exert control over the independent contractor?

If the answer to either of these questions is yes, then you should consider the following:

How specialized is the work?

The type of work provided by independent contractors is usually ancillary to the company and not integrated to the degree where the success or continuation of the company is dependent on those services. Often, independent contractors provide specialty services in areas where the company would otherwise have to make significant investments in hiring an employee to do the same type of work. Independent contractors often use their own tools, materials and equipment to provide these discrete and specialized services, including bearing the cost of expenses related to their specialized work.

How long is the assignment?

Generally, an engagement of independent contractors is limited in duration. Most companies hire on an at-will basis, but independent contractors are often brought in for a specific period of time or to complete a particular or discrete project, rather than to carry out more employee-like open-ended duties. Unlike employees, independent contractors and the engaging company often do not have an immediate right to terminate the relationship but, rather, must either provide sufficient notice or have material reasons to end the relationship.

How flexible is the task?

Unlike an employee, an independent contractor should carry out work pretty much outside the company's direct control. This includes having flexibility in the hours of work; not being required to comply with a specific set of detailed instructions; having the ability to hire and supervise assistants; being able to work off the company's premises; not having any set reporting requirement; and working outside the company's overall organizational structure.

How is the worker compensated?

Independent contractors are often compensated with a flat fee based on the project rather than an ongoing hourly, weekly or monthly payment, as is typically paid to employees. Payment on a flat-fee basis also allows independent contractors to realize profits or losses from their work, whereas an employee who receives an hourly wage or a salary is more insulated from these risks and rewards.

How independent is the worker?

Additionally, independent contractors are exactly that: independent. They are free to work for more than one company at a time and often do not devote all their time to one particular company.

Add it up

When deciding whether to bring in outside consultants or contractors, it is advisable to first ask yourself whether they will truly remain in the outsider role. Overall, if the balance of the above factors does not tip in favor of bringing in an independent contractor if someone is labelled a contractor but treated like an employee then your company may risk exposure for potential misclassification.

¹ There is also an issue of misclassifying employees as exempt v. non-exempt. For more on that issue, [please see our article](#).



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