

**New York State Department of Labor
Unemployment Insurance Division
Liability and Determination Section
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Independent Contractors

Understanding the distinction between independent contractors and employees could be vital for you and your business. You may genuinely believe that you have engaged individuals to perform services for you as independent contractors, only to discover that they are considered employees under the law and that you are liable for additional unemployment taxes and interest. Whether the relationship is one of employer-employee will depend on the degree of supervision, direction and control you have over the services.

THE EMPLOYER-EMPLOYEE RELATIONSHIP

The courts have found that no single factor or group of factors conclusively define an employer-employee relationship. Rather, all factors must be examined to determine the degree of supervision, direction and control. You are an employer *if you control what will be done and how it will be done, i.e, the manner, means and results.*

Indicators of control may include:

- determining when, where and how services will be performed
- providing facilities, equipment, tools and supplies
- directly supervising the services
- stipulating the hours of work
- requiring exclusive services
- setting the rate of pay
- requiring attendance at meetings and/or training sessions
- requiring oral or written reports
- reserving the right to review and approve the work product
- evaluating job performance
- requiring prior permission for absences
- reserving the right to terminate the services

How an individual is compensated is another indicator of worker status. Employees typically are paid a salary, an hourly rate of pay or a draw against future commissions with no requirement for repayment of unearned commissions. Employees may also receive certain fringe benefits, including an allowance or reimbursement for business or travel expenses.

The *nature of the services* performed is also significant in determining if a worker is an employee or an independent contractor. Unskilled or casual labor is usually employment because such services are typically subject to supervision. However, even professionals such as doctors and lawyers who have considerable freedom in the performance of their duties can be determined to be employees if they are subject to significant control.

The courts have also found that an employment relationship may exist if the employer controls important aspects of the services performed other than results and means. For example, a referral agency usually does not directly supervise the individuals it refers for assignments but it could be their employer if it controls such important aspects of the services as client contact, the individual's wages and billing and collection from clients.

THE INDEPENDENT CONTRACTOR RELATIONSHIP

Independent contractors are free from supervision, direction and control in the performance of their duties. They are in business for themselves, offering their services to the general public.

Indicators of independent contractor status may include:

- having an established business
- advertising in the electronic and/or print media
- maintaining a listing in the commercial pages of the telephone directory
- using business cards, business stationery, and billheads
- carrying insurance
- maintaining a place of business and making a significant investment in facilities, equipment and supplies
- paying one's own expenses
- assuming risk for profit or loss in providing services
- determining one's own schedule
- setting or negotiating own pay rate
- providing services concurrently for other businesses, competitive or non-competitive
- being free to refuse work offers
- being free to hire help

If an employer-employee relationship exists, it does not matter how the relationship is described by the person engaging the services. For example, if you issue individuals a 1099 form rather than a W-2 form, they may still be employees. Even if you have individuals sign a statement claiming independent contractor status and waiving any rights as employees, or if you require them to obtain a dba in order to work for you, those individuals may still be considered employees under the law. The Unemployment Insurance Law provides that no agreement by employees to waive their rights under the law is valid.

Remember that the real distinction between the employer-employee relationship and the independent contractor relationship depends primarily on the level of supervision, direction and control exercised by the person engaging the services. It is not defined by what the relationship is called by the participants.

Certain types of services are excluded or covered by statute regardless of the degree of direction and control.

If you believe that some of your workers are independent contractors, ask our Liability and Determination Section for a formal determination by writing to the address below. Include a copy of any contract and details of the relationship between the parties. You may also obtain guidance on worker status issues by calling the Liability and Determination Section at 518 457-2635.

Reference: www.labor.state.ny.us/dande/ic.shtm