

Independent Contractors - Are They Or Aren't They?

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The issue of independent contractors (IC's) continues to haunt employers, and may have an impact on the mortgage industry. Many organizations hire their sales staff as contractors for any number of reasons. The key to determining whether an individual is an IC or an employee is based on a number of factors.

The Internal Revenue Service uses the common-law factors listed below to determine whether a worker is an IC or a regular employee. Please remember that ALL the factors must be taken into consideration in determining contractor/employee status:

1. Instructions. An employer should not tell an independent contractor how to do a job.
2. Training. An employer should not provide substantial training for an independent contractor.
3. Integration. An independent contractor should not be hired to provide a service that is an essential part of an employer's business.
4. Personal Services. An employer should not insist that the work be performed by the contractor rather than someone that the contractor might hire.
5. Assistants. Independent contractors control and pay their assistants.
6. Length of Relationship. Independent contractors should not have a continuing relationship with an employer unless there are multiple contracts.
7. Work Hours. An independent contractor usually determines the hours worked to complete a job.
8. Amount of Work. An independent contractor should not be told to work full time for an employer if that would prevent the contractor from doing other work.
9. Location. Unless the services can be performed only in one location, an independent contractor chooses where to do the work.
10. Sequence of Work. Independent contractors determine the order in which they accomplish their tasks.
11. Reports. Independent contractors should not be required to produce interim reports.
12. Payment. Independent contractors are paid for the results of their work, not for the time worked.
13. Expenses. Independent contractors are responsible for their business expenses.
14. Tools. Independent contractors typically provide their equipment and tools.
15. Investment. An independent contractor has a significant investment in his business, such as a home office.
16. Profit. Independent contractors can realize profits and incur losses.
17. Multiple jobs. Independent contractors can work for more than one employer at a time.
18. Availability. Independent contractors make their services available to the general public.
19. Termination. Independent contractors cannot be fired at will, as can employees.
20. Liability. Independent contractors are liable for failure to complete a job.

The wrong determination can have disastrous consequences. Microsoft Corporation had hired a large number of IC's to work on many projects within the company. They were hired for specific projects but many of them worked for a number of years on these projects, they performed many of the same tasks as regular employees and they were provided with workspace, equipment and supplies. When an IRS audit was performed, based on the above and some other factors, these contractors were deemed to be employees. Microsoft settled these cases for \$96.9 million.

Some items to keep in mind for sales people:

- The greater the skill required, the more likely the person is an IC. The ability to sell is a specific skill.
- If the individual supplies his/her own tools and materials, it reflects IC status. Providing a salesperson with these items will raise a red flag.
- If the individual is in business for him/herself and has all the appropriate licenses and tax identification numbers, this would suggest an IC relationship. Having sales staff become S corporations will help.
- If the employer determines the work schedule, this reflects an employee relationship. Sales staff should be on their own in terms of hours worked. Requiring a few hours on site on a regular basis can erode the IC relationship.
- If the individual is treated as an employee for tax purposes, this creates an employee relationship. If it looks like an employee and it acts like an employee and it "feels" like an employee, it probably is!!

Guessing the employment status or creating an independent contractor status to reduce administrative headaches makes you very vulnerable. Conduct an audit of your company's employees and reclassify anyone who does not meet the 20-question test. IRS codes, wage and hour, benefit and discrimination laws are more of a nightmare. The best advice? Use the guidelines above, be realistic in your approach and err on the conservative side.

Paul Munoz is President of the HR Group, Inc., a human resources consulting firm working with organizations to attract, retain and motivate employees as well as working with senior management to improve their use of human capital. Dr. Munoz has extensive experience in designing, developing and implementing human resource programs to increase employee motivation, skill and desire to perform at high levels. He can be reached at 516-433-6588 or pmhrman@aol.com.