

Employees vs. Independent Contractors: What's the Difference?

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Objectives

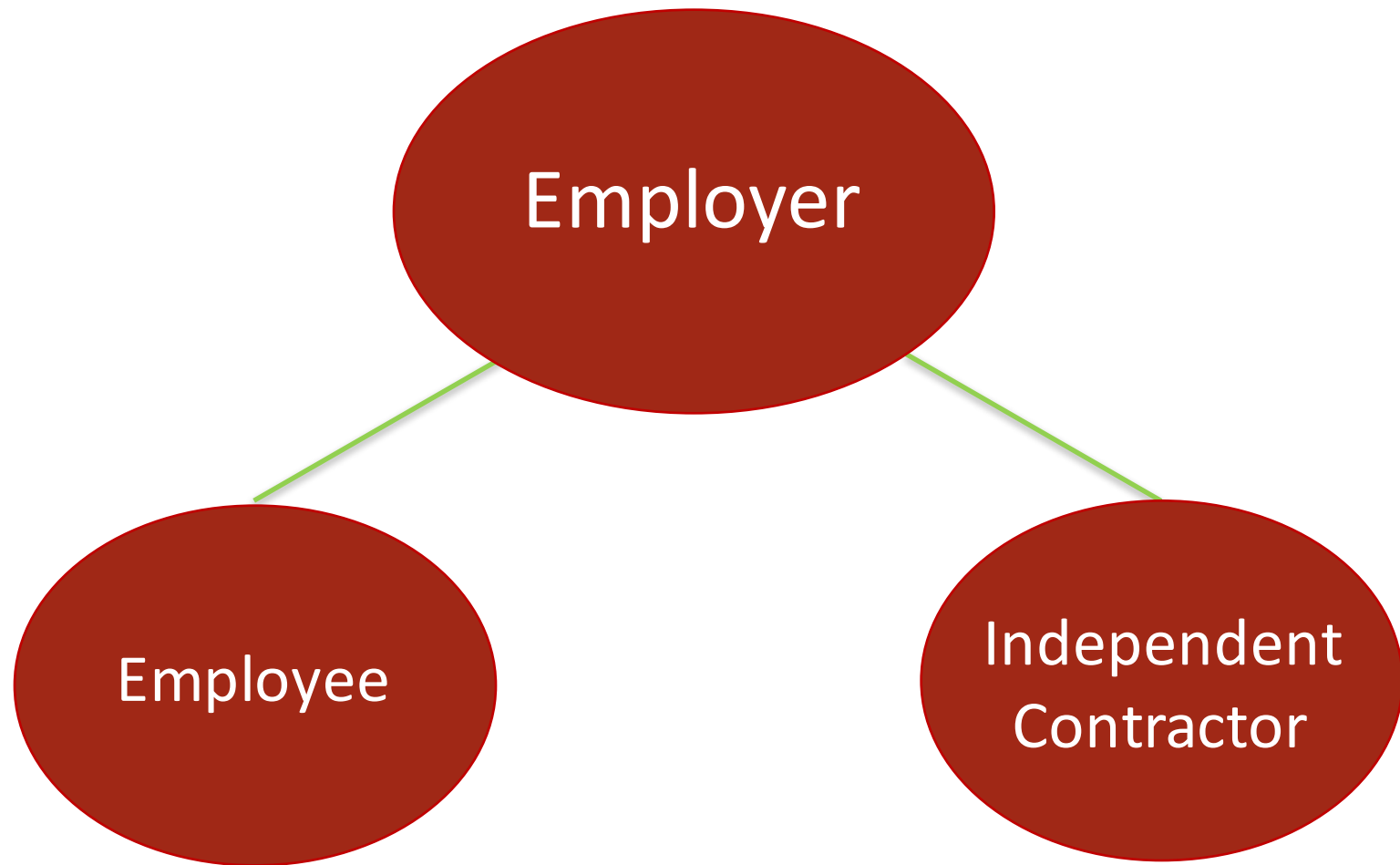
- Introduction
- Factors to consider when filling the organization's staffing needs
- Tests to determine worker status
- Consequences of misclassification
- Assumptions to avoid when classifying workers
- Proactive approach

Introduction

- Independent contractors
- Temporary employees
- Seasonal employees
- Leased employees
- Interns
- Volunteers



Definitions



Should I use an independent contractor?

- Duration
- Exclusivity
- Control
- Independent judgement
- Specialized knowledge, training or experience
- Stewardship of confidential matter
- Personal services

Additional factors to consider

- Importance of marketing
- Exigent circumstances
- Business essentials
- Employees doing the same job
- Industry standard
- Controlling administrative overhead

Determining worker status

- Various federal government agencies and some states have their own tests to determine independent contractor status.
- Courts have applied different tests for determining whether an individual is an employee or an independent contractor.

Internal Revenue Service (IRS)

- Common-Law Test (FKA the “20 Factor Test”)
- The IRS now looks at 11 factors that provide evidence of the degree of control and independence within 3 categories:
 - Behavioral control
 - Financial control
 - Type of relationship

Internal Revenue Service (IRS)

A. Behavioral Control

1. Instructions that the business gives to the worker
2. Training that the business gives to the worker

Internal Revenue Service (IRS)

B. Financial Control:

3. The extent to which the worker has unreimbursed business expenses
4. The extent of the worker's investment
5. The extent to which the worker makes his or her services available to the relevant market.
6. How the business pays the worker
7. The extent to which the worker can realize a profit or loss

Internal Revenue Service (IRS)

C. Type of Relationship

8. Written contracts describing the relationship the parties intended to create
9. Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay or sick pay
10. The permanency of the relationship
11. The extent to which services performed by the worker are a key aspect of the regular business of the company

U.S. Department of Labor (DOL)

- Economics Realities Test

This test includes the following six factors aimed at helping courts make this determination:

1. Is the work an integral part of the employer's business?
2. Does the worker's managerial skill affect the work opportunity for profit or loss?
3. How does the worker's relative investment compare to the employer's investment?

U.S. Department of Labor (DOL)

4. Does the work performed require special skill and initiative?
5. Is the relationship between the worker and the employer permanent or indefinite?
6. What is the nature and degree of the employer's control?

Wrestling to be an employee



Über problems for Uber

- Drivers launched a lawsuit because they felt they were misclassified as independent contractors.
- Uber settled with the drivers for \$100 million.



San Diego Union Tribune

- In January 2014, the San Diego Union-Tribune had to pay a total of \$11 million after the court determined it had misclassified more than 1,200 of its paper carriers as independent contractors.

The San Diego Union-Tribune

Delivering settlements



- *Alexander V. FedEx*
 - 2,300 misclassified drivers
- “We hold that plaintiffs are employees as a matter of law under California’s right-to-control test”
- \$228 million settlement



Consequences of misclassification

- Unpaid federal, state and local income tax withholdings, as well as social security and Medicare contributions;
- Unpaid federal and state unemployment insurance taxes;
- Unpaid workers' compensation premiums;
- Unpaid overtime compensation and/or minimum wages;
- Unpaid work-related expenses; and
- Unpaid sick and vacation pay

Avoiding assumptions

- When classifying workers, employers should avoid making their decision based on any of the following common assumptions:
 - The worker wanted, or asked, to be treated as an independent contractor;
 - The worker signed a contract;
 - The worker does assignments sporadically, inconsistently, or is on call;
 - The worker is paid commission only; or
 - The worker does assignments for more than one company

Taking a proactive approach

- Seek human resources expertise when making the decision to meet a staffing need.
- Use written independent contractor agreements containing language that helps establish the bona fides of the classification as an independent contractor.
- Adopt a policy concerning the use of independent contractors and temporary employees.
- Do not treat independent contractors as you treat regular employees, but instead ensure that they understand and adhere to the organization's policies and procedures.

Conclusion

- There is a sizeable difference between employees and independent contractors.
- There are tests and factors to consider when classifying workers as independent contractors.
- The substance of the work relationship will determine classification, not labels.



Q&A

Reminders

- The recording of this webinar will be available on the G&A Partners website soon (www.gnapartners.com).
- This webinar has been pre-certified for 1 hour of general recertification credit toward PHR, SPHR and GPHR recertification through the HR Certification Institute.

We will send out an email to all those who are confirmed as attended with the program ID code to note on your HRCI recertification application form.



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