

## - "What if Your Independent Contractor is Your Employee?"

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Hiring on a temporary basis or for a particular project is often a vexing issue for the small business owner. Trouble is, sometime they don't appreciate how vexing. Many small businesses experience volatility in their business volume that requires them to lay-off, re-hire or hire anew on temporary bases in order to keep up. One solution to the scalability issue is to hire independent contractors on an as-needed basis. Great! Most often, the solution is a win-win for the small business and the contractor. Problem is that sometimes nature of the relationship becomes an important after-the-fact issue. The worker may have a change of heart about whether they should be deemed an employee. Why, you ask? The reasons vary, but they usually involve a desire to receive workers' compensation benefits, unemployment benefits, or overtime pay. Or, sometimes either the worker or the business faces questions from a taxing authority about whether the business should have been paying payroll taxes for the worker.

The point is that a decision about whether to hire a worker as an employee or as an independent contractor often requires legal analysis to determine whether the worker would likely be characterized as an employee for purposes of the business' payroll, payroll tax, workers' compensation and unemployment insurance premium payment responsibilities. The factors or tests applied to determine whether a worker is an employee for all of these purposes varies slightly by agency – whether the Department of Revenue, Workers' Compensation Division, Bureau of Labor and Industries – and by jurisdiction – federal versus state. All make their own determinations if necessary. In very broad terms, the more employer control over the place, time, method and materials used by a worker to perform is work, the more likely the worker will be characterized as an employee rather than a contractor. The penalties for getting it wrong are substantial and reputational risk is an important consideration.

Independent contractor relationships can also be complicated by other factors that should usually be addressed in a well-written contract. Who owns any intellectual property that is created? What data is confidential and how will it be handled both during and after the relationship. If the worker is to have extensive client contact, how can the owner best protect those relationships for when the worker departs? When in doubt, a business attorney should be consulted to discuss the nature of the work, the nature of payment and the type of agreement that should be in place between the parties.