



Employee or Independent Contractor?

What You Don't Know CAN Hurt You

IF you are a business owner, knowing the difference could impact whether or not you are exposed to financial liability – at the corporate level and personally – for unpaid wages and insurance, penalties, interest, and a costly finding from the New York State Department of Labor that can affect your entire workforce.

By law, businesses must pay their employees at least the prevailing wage, secure workman's compensation insurance, withhold income taxes and pay unemployment and social security taxes on those wages. No such insurance, tax or withholding obligations are imposed upon businesses for independent contractors they retain to perform services.

Because of the drastic difference in burden placed upon a business that pays "employees" versus one that pays "independent contractors," employee misclassification has become a widespread problem in New York State. Many businesses, intentionally or not, improperly classify workers as independent contractors when they are really employees, thereby seemingly evading the additional cost and responsibility associated with having employees.

In order to combat the misclassification problem and generate revenue for the state, various New York

agencies formed the Joint Enforcement Task Force on Employee Misclassification in 2007. These agencies, which include the Department of Labor, the Department of Social Services, the Workman's Compensation Board and the Department of Taxation and Finance, are working collaboratively, along with the IRS, to crack down on businesses in New York's borders that fail to properly classify their workers as employees, contribute requisite taxes and secure appropriate insurance.

The NYS Department of Labor is charged with aggressively auditing businesses to determine whether or not they are classifying workers as independent contractors when they are actually "employees."

In the year 2014 alone, the NYS Department of Labor completed over 12,000 audits and investigations that resulted in findings of nearly 26,000 instances of employee misclassification and assessments of nearly \$8.8 million in unemployment insurance contributions.¹

These are liabilities that are assessed to businesses but that can be attributed to the principals of these companies personally if not resolved at the corporate level.

1. [New York State Annual Report of the Joint Enforcement Task Force on Employee Misclassification](http://www.labor.ny.gov/AgencyInfo/PDFs/Misclassification-Task-Force-Report-2-1-2015.pdf), dated February 1, 2015 at <http://www.labor.ny.gov/AgencyInfo/PDFs/Misclassification-Task-Force-Report-2-1-2015.pdf>.

Who is at Risk?

ALL businesses operating in New York are at risk for being audited or investigated, although companies that have been charged with the greatest frequency of employee misclassification include those in construction, transportation, hospitality and specialty worker industries. A business will be at increased risk for investigation if one of its workers (former or current) files a claim for a violation of labor or employment laws, another state agency communicates with the Department of Labor about a possible misclassification, or specific legislation, including the NYS Commercial Goods Transportation Industry Fair Play Act and the Construction Industry Fair Play Act, targets an industry for investigation and enforcement of the law.

How do I Know if I Have Employees or Independent Contractors?

Determining whether or not a worker is properly classified as an "employee" or an "independent contractor" is fact specific, and the test applied for making such a determination varies in different industries.

For example, where the "common law test" is applicable, the level of supervision, dominion and control that a business has over a worker may strongly influence the determination, but other factors to consider include whether or not the worker has a separate company, offers its services for hire to the general public and otherwise performs similar or identical services for competing "clients" simultaneously. If, rather, the "ABC test" is the operative test, as is the case for those businesses in the construction and transportation industries, then a determination may be more heavily influenced by identifying who is responsible to pay for a worker's taxes and bills if he or she is injured on the job.

What Can I do to Reduce My Exposure to Liability?

Fortunately, a business that takes appropriate steps to understand and follow the law, implement appropriate record-keeping procedures and work with the proper legal, human resources, insurance and tax professionals can significantly reduce the risk of being exposed to major liability arising out of a NYS Department of Labor audit.

Any business operating in New York that is unsure of its compliance with the law ought to consider working with its trusted advisors to review, assess and possibly modify operating practices and workforce classification.



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