

Checklist to Protect You From an Independent Contractor Misclassification Claim

- First, check out the IRS criteria, [Independent Contractor or Employee](#), to ensure an independent contractor (IC) relationship.
- Don't have them go through your "usual" hiring process used for employees. For example, don't have them fill out a job application.
- When you hire independent contractors make sure to request a resume, interview them, check their references and conduct background checks.
- Reduce your agreement to writing.* Make sure you address the essential factors, including the issues of control, place of employment, tools to be utilized, etc., in the Agreement. Make sure it contains "work for hire" language. *Have the final draft reviewed by an attorney.*
- Pay attention to the wording of all benefit plans, including health, vacation and sick leave, profit sharing, stock purchase plans, pension plans, and 401(k) plans, particularly with respect to which workers are eligible for the plans and which workers are not. Insert a clause into each plan that specifically excludes independent contractors. Then make sure these changes are reflected with a "mirror image clause" in the agreement you ask these workers to sign. Consult an attorney as to the proper wording of these clauses.
- Obtain a *business card, brochure, business license, and W-9* from the independent contractor and retain them in your files.
- File an IRS 1099 form for the independent contractor's wages if over \$600.
- Keep the independent contractor's file separate and apart from company personnel files.
- Obtain *proof of workers' compensation insurance coverage and general liability coverage* from the independent contractor and save it. Either that or make sure they are covered under your policy.
- Obtain proof of an *employer identification number (EIN)*. Use it on all payments to the independent contractor.
- Make sure they invoice you for payment.
- Make sure the independent contractor is not reimbursed for expenses and that they pay for them directly.
- Don't allow independent contractors to hold themselves out as company employees. Their names should not appear on company letterhead, brochures, business cards, or other materials unless it is specifically indicated that they are an independent contractor, independent representative, affiliate, etc.
- Consider having independent contractors provide you with *indemnity* against any form of claim by any agency or third party related to their scope of services. It is cautioned that any form of indemnity provision be declared void as a matter of public policy should the individual, in fact, be found to be an employee and not an independent contractor.
- Find out what it would cost to use a leased or temporary employee from an *established agency*. Let them worry about the individual's employment status.
- Don't micro-manage or direct their work.
- Don't give them employee benefits (health care, vacations, holidays, etc.)
- Don't have them wear company uniforms.
- Don't fire them unless they breach the contract or engage in some form of wrongful conduct.
- Be aware some state courts are beginning to allow independent contractors to bring claims for *wrongful discharge, sexual harassment, etc.*, despite the fact that they are not "employees." You may consider having them sign Equal Employment Opportunity policies, provide them with sexual harassment prevention information if they are working on premises.
- Make sure to include independent contractors in any safety training programs. You cannot delegate workplace safety responsibility to third parties.
- If in doubt, obtain an advance IRS classification ruling by filing form number SS-8.
- If you know you have misclassified an independent contractor, you may be able to take advantage of frequent federal and state *amnesty programs*. They typically require you to pay the taxes owed and penalties are waived. Contact the IRS, your Employment Development Department or other taxing authorities.

You are encouraged to get access to the ThinkHR compliance program. To learn more contact me today at don@donphin.com