

## **INDEPENDENT CONTRACTOR OR EMPLOYEE?**

**That is the question. Many employers believe workers are independent contractors because they issue the worker a Form 1099, or the worker doesn't receive any benefits, or the worker sets his/her own hours or works irregular hours. This is not always the case.**

North Dakota law provides that a person who performs services for others is presumed to be an employee unless it is PROVEN that the person is an independent contractor. It is the burden of the person asserting Independent Contractor status to prove that fact (North Dakota Century Code § 65-01-03). Employers and workers need to be aware that Independent Contractor status is not automatic. The parties' intent may be an Independent Contractor relationship. However there are several different factors that are considered when making a determination.

There is a "common law" twenty-point test that is used in making determinations. No single factor is the

answer, all factors are considered. However, certain factors are given more weight. For the complete listing of these factors see N.D. Administrative Rule § 92-01-02-49, which is available <http://www.legis.nd.gov/information/acdata/pdf/92-01-02.pdf?20131204082058> . The following factors are given more weight when making determinations.

- *Significant Investment*----Does the worker have an investment in the work he does, such as trade specific tools or equipment, an office or shop, advertising, liability insurance, licenses, vehicles, inventory, etc.? Lack of investment indicates an employee relationship.
- *Integration*----Is the worker integrated into the hiring firm's operation? More integration implies direction and control and an employee relationship.
- *Continuing Relationship*----Does the worker provide services over a continued period of time, even at frequently recurring, although irregular intervals. This is consistent with an employee relationship.
- *Works for more than one person or firm*----If a person performs

services under multiple contracts for more than one firm at a time, this implies an independent contractor relationship.

- *Realization of Profit or Loss*----Does the worker incur expenses that are not reimbursed, or is an investment too costly? For example a specific piece of equipment may have cost more than the job itself; however over time the worker may realize a profit from frequent use of the equipment. The worker therefore can incur a profit or loss and this implies an Independent Contractor relationship.
- *Making Services Available to the General Public*----Does the worker hold him/herself out to the general public as doing these services on a regular basis? This implies an Independent Contractor relationship.
- *Right to Dismissal*----The right for either party to terminate services at any time implies an employer/employee relationship. The possible liability of breach of contract exists with an Independent Contractor.

Some of the other factors that are considered are:

1. Does the worker have the ability to hire help and to control those helpers?
2. How does the firm pay the worker- by the hour, day or job?
3. Is the worker reimbursed for expenses?
4. Is there a written contract?
5. Are there set hours of work?
6. Tools and equipment are furnished by whom?
7. Is there instruction as to how, when, and where to do the work? Or how the work is actually achieved?
8. Is any training provided by the firm? (Most independent contractors use their own methods and receive no training.)
9. Does the worker have the option to decline your work/assignments?

A written agreement between the firm and the worker is always a good idea. Remember, an independent contractor agreement is only beneficial if it is followed. If the worker acts and is treated like an employee, then the actual agreement is useless. A firm should review the entire situation of each worker that performs

services for that firm. The following is a simple questionnaire that may help firms determine if the workers they hire are employees or independent contractors. Ask workers these questions when you hire them:

Does the worker have any significant investments in their own business? (Examples: trade specific tools or equipment, an office or shop, advertising, liability insurance, licenses, vehicles, inventory)  
 Yes  No

Will the worker receive a flat fee for services?  Yes  No

Does the worker have any helpers or employees?  
 Yes  No  
 If yes, require a copy of their current workers compensation certificate.

Does the worker have the option to decline this work?  Yes  No

Will the worker be responsible for any incidental expenses incurred in performing the service?  
 Yes  No

Does the worker advertise his/her services in the newspaper or Yellow Pages?

Yes  No

Ask to see a business card.

Are the worker's services available to the public on a regular basis?

Yes  No

If the worker is a contractor:

Does the worker have a contractor's license?

Yes  No

If yes, require a copy.

Does the worker contract with others for similar services?  Yes  No

These are just a few initial questions to ask and only a guideline. If the worker can answer "Yes" to these questions, it is probable that the worker has an independent contractor relationship with the firm. However, it is not an actual determination. If you are still unsure if a true independent contractor relationship exists, have Workforce Safety & Insurance make an official determination.