

# THE INSIDE PERSPECTIVE

LABOR AND EMPLOYMENT LAW SOLUTIONS FOR EXECUTIVES AND HR PROFESSIONALS



SMITH MOORE LLP  
ATTORNEYS AT LAW

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## Is He or Isn't He (an Independent Contractor)?

Your business decides to retain the services of a consultant and to pay him as an independent contractor. What a cost savings! No overtime pay, no benefits, no tax withholding or FICA obligation - not even a requirement that he be covered by worker's compensation. But calling him a "consultant" does not make him an independent contractor in the eyes of the law. The test varies depending on the government agency investigating. Typically, the following factors are relevant:

- What right of control does the business have over the individual? Can the business direct the day-to-day manner in which the work is performed? Or does the business describe the outcome it desires and allow the individual to determine how to accomplish it?
- Does the individual have the opportunity to make a profit or suffer a loss? Is he paid a salary or by the hour? Or does he receive "commission" or other payment by the project?
- What is the duration of the relationship? Is it indefinite, or does it extend from one project to the next? Or must the terms of the relationship be renegotiated at the conclusion of the project?
- Does the individual own the materials and equipment used to perform the work? Does the individual employ the personnel required for the job? Or are the materials, tools, and personnel furnished by the business?
- Does the individual have a special skill or expertise? Or does he require training to do the job?
- Does the individual market his services to others? Or is he subject to a noncompete or other expectation that he will not perform work for others?
- Does the individual perform the same type of work that employees provide? Or is the work "peripheral" and not the type of work that is central to the mission of the business?
- Is the business free to discharge the individual at any time? Likewise, can the individual stop work at any time? Or are there contract terms that limit termination of the relationship?

# TIP

The downside to misclassifying an employee as an independent contractor can be big: liquidated damages for back overtime, FICA contributions, uninsured risk, lost benefits, interest, and penalties assessed by the IRS. No single factor controls, but if the reality is that the worker depends on your business and is not truly in business for himself, look again before deciding to treat him as an independent contractor.



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The firm restricts its practice in the labor and employment area to the representation of management.



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