

Commentator cautions on relations of contactors and subs

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Outsourcing work to independent contractors is probably more common in the construction industry than in many other industries. After all, bringing in qualified independent contractors to handle various aspects of a project with tight deadlines makes perfect sense. It also makes financial sense.

But don't let the financial advantages of hiring independent contractors blind you to the need to consistently treat them as independent contractors. Get familiar with the factors the Internal Revenue Service uses to help differentiate an independent contractor from an employee.

If you misclassify an employee as an independent contractor, federal and state tax authorities will seek unpaid payroll taxes - and most likely penalties and interest on that amount - from your company. You could be forced to provide the worker with the same benefits you provide for your employees.

The Internal Revenue Service reviews a wide range of common law factors in determining whether a worker is an employee or an independent contractor. Depending on the circumstances, such factors include:

- Behavioral control: Independent contractors are not under the direct supervision and control of company personnel and do not receive detailed instructions about how work is to be performed. Even if no instructions are given, behavioral control may exist if the business has the right to control how the work is performed.

- The issue of training also is weighed by the IRS. Independent contractors do not receive company-provided training about procedures to be followed and methods to be used in performing a task.

- Financial control: The facts that determine whether a business has the right to control the business aspects of a worker's job include:

- The extent to which the worker has unreimbursed business expenses
- The extent of the worker's investment
- The extent to which the worker makes services available to others
- How the business pays the worker
- The extent to which the worker has the opportunity to realize a profit or loss

Certain factors can illustrate the nature of the parties' relationship:

- Written contracts that describe the relationship the parties intend to create
- Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation or sick pay
- The permanency of the relationship - an independent contractor's services typically are for separate and distinct projects, but employees also may be hired on a seasonal or project basis
- The extent to which services performed are key components of the company's regular business
- Whether a worker is hired with the expectation that the relationship is for more than a specific period or project