

6 factors to consider to ensure that your subcontractors are NOT employees



Ryan Neumeyer | Tuesday, November 28, 2017

In the home improvement/residential construction business, many contractors enlist the help of subcontractors to service their clients. There are a variety of reasons why a contractor would want to use contract labor rather than their own employees to perform work. Some contractors may have a specialty job for which they do not have the proper tools or expertise. Other times, especially in today's labor market, a contractor may not have enough labor to complete a job for the client.

Whatever the reason, contractors need to be aware that sometimes subcontractors can be deemed employees. This could lead to substantial liability on part of the contractor, including indemnifying their work, tax penalties, being forced to cover any injuries that may occur through the company's workers' compensation policy, and many other issues.

Below are six factors used by various government agencies to determine whether a subcontractor is an independent contractor and not an employee.

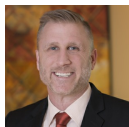
1. The permanency of the relationship between the parties.
2. The degree of skill required for the rendering of the services.
3. The extent of the worker's investment in equipment or materials for the task.
4. The worker's opportunity for profit or loss, depending upon his skill.
5. The degree of the alleged employer's right to control the manner in which the work is performed.
6. Whether the service rendered is an integral part of the alleged employer's business.

These six factors are the United States Department of Labor's economic realities test for use in determining whether a contractor is an employee of the purposes of minimum wage and overtime. However, it is generally considered to be the broadest of the many tests. Contractors should be aware that every state and various federal agencies have differing tests. These tests determine employment status for the purpose of federal and state tax, workers' compensation, unemployment insurance, immigration, state and federal wage and hour law, state and federal discrimination and disability laws, among others.

There are steps that can be taken to ensure compliance with the applicable laws and regulations. For instance, you could require your subcontractors to provide you with their advertisements, their business information, and workers' compensation insurance. You could enter into a formal written contract which allows the subcontractor to work for other contractors or on their own jobs, among other things. In addition, your subcontractor agreement can include provisions that will assist contractors in mitigating risk, such as an arbitration clause, and a class waiver agreement.

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Given the extent of the potential liability, if your business uses subcontract labor you should have your attorney analyze your relationships to ensure compliance and prevent unwanted liability.



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