

IF IT WALKS LIKE A DUCK... TALKS LIKE A DUCK – IT’S A DUCK!

DIFFERENTIATING BETWEEN CONTRACTORS AND EMPLOYEES

by Mark Wagner

You have contractors who sit at desks next to regular benefited employees. They perform similar jobs, use company equipment, and take direction from company supervisors and managers. If you didn't know any better, you might think they were employees! Problem is, should a dispute arise, a court or governmental agency might deem them to have been employees all along, leading to a whole host of potential liabilities for an employer.

What are some of the liabilities you could face should the contractor be deemed an employee?

- Liability to the IRS and the Utah Tax Commission for failure to withhold employment taxes and failure to make employer matching contributions (e.g., FICA and MedFICA);
- Liability for unpaid overtime wages and, in extreme cases, for failure to pay federal and state-mandated minimum wages;
- Liability for payment of retroactive benefits, including vacation pay, stock options, medical benefits, and 401(k) contributions;
- Liability under federal and state anti-discrimination laws and employee-rights laws that are triggered by the number of employees a company has (e.g., Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act);
- Liability for failure to maintain state and federal unemployment insurance coverage;
- Liability for failure to maintain workers compensation insurance coverage; and
- Liability to third parties for negligent acts by the subject individuals.

Know the Difference.

An independent contractor is often described as a person engaged in an occupation who contracts with others to perform work according to

the contractor's own methods, without being subject to the control of the others except for the result. Thus, a basic tenet of an independent contractor relationship is that a contractor has an independent occupation and is responsible for only the finished product.

In contrast, an employee is a person engaged to perform work for an employer on terms and conditions set by the employer, and subject to the control of the employer not only as to the result to be achieved, but as to the way in which the result is achieved. Insofar as the work of the employer is concerned, there is little that is truly "independent" about the relationship between the employee and the employer.

Although these descriptions provide a starting point, they are not sufficiently specific or comprehensive to apply to all of the factual situations that may arise. Therefore, courts and governmental agencies consider a number of factors when determining whether a person is an independent contractor or an employee in a particular situation.

Context Is Everything.

There are several sets of factors for determining whether a person is an independent contractor or an employee. The set of factors that applies in a given situation depends on the specific reason for making the determination.

Historically, courts have been asked to make the independent contractor vs. employee determination for the purpose of deciding whether a company that hired a worker can be held liable for that worker's negligent acts. Thus, courts have developed a set of factors to be considered for that purpose. Where the purpose is to determine whether a particular statute applies in a given situation, however, a different set of factors may be appropriate depending on the specific purpose behind the statute. In addition,

in some areas, governmental agencies have weighed in on the matter, and have issued regulations containing their own set of factors for making such a determination. For example, IRS regulations specify a 20-factor test for determining whether a person is an employee for tax-withholding and employer contribution purposes. Thus, it is possible that a person may be determined to be an independent contractor for purposes of one statute and an employee for the purposes of another.

Notwithstanding the existence of more than one test for employee status, there is considerable overlap in the factors considered under the various tests. For example, the factors evaluated by courts in determining employee status for minimum wage and overtime pay purposes are relevant to varying degrees under any of the tests.

(article continued on back)



MARK A. WAGNER is Chair of the Labor and Employment Law Group at Van Cott, Bagley, Cornwall & McCarthy. He can be reached at 801.237.0345 or at mwagner@vancott.com. For more employment-related articles, visit www.vancott.com.

This test looks at the following factors:

- the degree of control exerted by the alleged employer over the worker (with a particular focus on control exercised over the manner and means by which a worker achieves a particular result, as opposed to control over only the result itself);
- the worker's opportunity for profit or loss;
- the worker's investment in the business (including the tools and equipment used to perform the work, and the facility or premises at which the work is performed);
- the permanence of the working relationship;
- the degree of skill required to perform the work; and
- the extent to which the work is an integral part of the alleged employer's business.

None of these factors are controlling; rather, the ultimate determination is based on "the totality of the circumstances." Other tests give particular weight to the "control" factor, looking to the employer's right to exercise control over the worker, regardless of whether it actually exercises that right.

The Bottom Line.

Any determination as to whether a person is an independent contractor or an employee requires a close examination of the specific facts involved and consideration of the legal context, or reason, for making the determination. Nonetheless, as a general rule, the more an employer treats its purported contractors like employees (or the more similarly it treats its contractors to its existing, classified employees), the more likely it is that a court or governmental entity will treat them the same way. ■