

Who Cares if You Are an Employee or an Independent Contractor?

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I. Employee vs. Independent Contractor:

EMPLOYEE	INDEPENDENT CONTRACTOR
1. Must withhold taxes	No taxes withheld
2. Must pay employer's portion of Social Security and Medicare taxes	Individual pays full Medicare and Social Security taxes
3. If applicable, must provide and cover benefits such as disability, life insurance and medical, pension contributions, vacation pay, and sick pay, plus Family Medical Leave	No benefits provided
4. Wages subject to unemployment insurance taxes	Wages not subject to unemployment insurance taxes
5. When laid off can collect unemployment benefits	Not entitled to unemployment benefits
6. Wages are used to establish workers' compensation insurance premiums	Wages not used in calculating workers' compensation premiums

Federal & State Government

Federal and state governments are closely scrutinizing this issue, and are:

- auditing employers to determine if individuals are truly independent contractors versus employees, and
- seeking funds to replenish the depleted unemployment insurance funds, and also to ensure that taxes are paid on a timely basis on an individual's wages.

Insurance Carriers

- Insurance carriers are now scrutinizing, in great detail, the arrangements entered into between employers and individuals performing work for the employers.
- This includes reviewing the arrangements between the individuals and the employer, particularly whether or not the contracts entered into under A.R.S. § 23-902(D) are legitimate.
- The wages paid to an independent contractor are not included in the wages used to calculate workers' compensation insurance premiums.

Insurance Carriers

- Even if an insurance carrier has not collected premiums for “independent contractors’ wages,” if that individual is determined to be an employee of the employer, pursuant to A.R.S. § 23-963, the insurance policy is deemed to “cover the entire liability of the employer to the employees covered by the policy or contract.”
- A number of insurance carriers are currently issuing premium assessments against employers for premiums based upon wages that they believed were improperly coded as payments to independent contractors, as opposed to employees.

The Worker

- Many of the individuals who are characterized as independent contractors by employees or agencies really have no control over the designation placed upon them.
- They do not have their own medical coverage, they do not have disability insurance, and many of them make enough money that they do not qualify for AHCCCS coverage.

The Worker

- When these individuals sustain injuries, they are going to try to create an employee relationship with the employer for whom they are working in order to secure medical coverage and disability benefits.
- If the employer is uninsured for workers' compensation benefits, the No Insurance Division will step in and try to find another employer that is insured for workers' compensation benefits and assert that the individual is actually an employee of the insured employer under the Statutory Employer Statute, A.R.S. § 23-902.

Definitions

Direct employee:

A direct employee is an individual who enters into a contract of hire with an employer to perform under the direction and control of the employer, work that is a part of the process in the trade or business of the employer.

Definitions

Special employee:

A special employee is an individual who is the direct employee of a company who is assigned or lent to another employer, and during the course of the employment with that company meets the following three criteria:

- a) the employee has made a contract of hire, express or implied, with the special employer;
- b) the work being done is essentially that of the special employer; and
- c) the special employer has the right to control the details of the work.

When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workers' compensation.

Definitions

Remote employee:

A remote employee is an employee of a contractor who, by virtue of the statutory employer doctrine, is deemed to be the employee of the company the contractor contracted to perform work for.

Definitions

Independent contractor

An independent contractor is defined in A.R.S. § 23-902(C) as follows:

“A person engaged in work for a business, and who while so engaged is independent of that business in the execution of the work and not subject to the rule or control of the business for which the work is done, but is engaged only in the performance of a definite job or piece of work, and is subordinate to that business only in effecting a result in accordance with that business design, is an independent contractor.”

Employee v. Independent Contractor

A.R.S. § 23-902(C) considerations:

1. contract for hire
2. work performed must be a part of the employer's regular business or course of trade

Employee v. Independent Contractor

- A) For school districts, an employee is defined as follows: every person in the service of the state or a county, city, town, municipal corporation or school district, including regular members of lawfully constituted police and fire departments of cities and towns, whether by election, appointment or contract of hire. (A.R.S. § 23-901(6)(a))
- B) Contract of hire:
 - 1. May be express or may be implied (DeVoll v. Industrial Commission, 118 Ariz. 591, 578 P.2d 1020 (App. 1978)).
 - 2. Individual need not be paid directly by “employer” if the employer controls the details of the individual’s work.” (McNeil v. Industrial Commission, 126 Ariz. 579, 617 P.2d 531 (1980))

Employee v. Independent Contractor

A.R.S. § 23-902(D)

Purpose:

- make clear what must be present in the relationship between the individual and the employer for a true independent contractor relationship to exist;
- precludes the insurance carrier from asserting that the money paid to the independent contractor is really wages that should be used in calculating the workers' compensation premium.

Employee v. Independent Contractor

A.R.S. § 23-902(D)

“A written agreement executed in compliance with this subsection creates a rebuttable presumption of an independent contractor relationship between the parties if the written agreement contains a disclosure statement that the independent contractor is not entitled to workers' compensation benefits from the business. Unless the rebuttable presumption is overcome, no premium may be collected by the carrier on payments by the business to the independent contractor if a fully completed written agreement that satisfies the requirements of this subsection is submitted to the carrier. The written agreement shall be dated and contain the signatures of both parties and, unless otherwise provided by law, shall state that the business:

Employee v. Independent Contractor

A.R.S. § 23-902(D)

1. Does not require the independent contractor to perform work exclusively for the business. This paragraph shall not be construed as conclusive evidence that an individual who performs services primarily or exclusively for another person is an employee of that person.
2. Does not provide the independent contractor with any business registrations or licenses required to perform the specific services set forth in the contract.
3. Does not pay the independent contractor a salary or hourly rate instead of an amount fixed by contract.
4. Will not terminate the independent contractor before the expiration of the contract period, unless the independent contractor breaches the contract or violates the laws of this state.

Employee v. Independent Contractor

A.R.S. § 23-902(D)

5. Does not provide tools to the independent contractor.
6. Does not dictate the time of performance.
7. Pays the independent contractor in the name appearing on the written agreement.
8. Will not combine business operations with the person performing the services rather than maintaining these operations separately.”

The courts are not going to sit by and allow agreements to be entered into that are designed solely to avoid the payment of taxes by employers or to avoid wages being reported for workers' compensation premium purposes.

Employee v. Independent Contractor

In determining whether there is a contract of hire and an individual is an employee, as opposed to an independent contractor, the courts and administrative law judges look for two specific things.

1. First, is the work being performed by the individual part of the regular business of the purported employer?
2. Second, does the employer retain supervision and control over the details of the work?

Molnar v. Industrial Commission, 141 Ariz. 530, 687 P.2d 1285

Employee v. Independent Contractor

Sole proprietor provisions:

- A.R.S. § 23-902(E) states that an employer who uses the services of a sole proprietor who has waived his rights to workers' compensation coverage under A.R.S. § 23-961(P) is not liable for workers' compensation coverage or the payment of premiums for the sole proprietor.
- The form set forth in A.R.S. § 23-961(P) is as follows:

“I am a sole proprietor, and I am doing business as (name of sole proprietor). I am performing work as an independent contractor for (name of employer). I am not the employee of (name of employer) for workers' compensation purposes, and, therefore, I am not entitled to workers' compensation benefits from (name of employer), I understand that if I have any employees working for me, I must maintain workers' compensation insurance on them.”

The Statutory Employer Principle

- This principle applies only to the those situations in which a contractor has entered into a contract with an entity to perform work for the entity.
- It is the contractor who is performing work for the entity, as opposed to employees of the contractor being lent to the entity.
- As such, the principles are different—the employees of the contractor should normally be covered for workers' compensation benefits by the contractor's insurance carrier.

The Statutory Employer Principle

- However, more and more of the contractors do not have workers' compensation insurance, and generally the Special Fund/No Insurance Division asserts that the employees of the contractor are the statutory employees of the entity.
- In addition, the entity may contend that the contractor's employees are really statutory employees of the entity in order to avail themselves of immunity from civil suit.

The Statutory Employer Principle

- Employees who are deemed remote employees do not have to consent to the statutory employer situation.
- Instead, the employees of the contractor will be deemed to be employees of the “entity” which is the statutory employer if two specific criteria are met:
 1. the work being performed by the contractor is a part of the normal work or trade of the “statutory employer”; and
 2. the statutory employer retains control over the details of the work being performed by the contractor and the contractor’s employees/subcontractors.

Special Employees

- The school district may request that temporary agencies supply it with certain individuals.
- Generally, the individual is the direct employee of the agency that is supplying the worker to an employer/organization, such as a school district.

Special Employees

The school district can become the special employer of the individual if a contract of hire is entered into (a contract may be implied), and the individual is under the direct supervision and control of the school district, performing work that is a part of the ordinary business of the school district.

Special Employees

- If all of these criteria are met, then the individual is the special employee of the school district, and both the general employer and the special employer are jointly responsible for workers' compensation payable to the injured worker.
- This problem is generally avoided by an indemnification agreement whereby the agency and its insurance carrier agree to indemnify the school district for any benefits it and its insurance carrier have to pay in workers' compensation benefits.

Special Employees

Labor Force v. Industrial Commission, 184 Ariz. 547, 911 P.2d 553 (App. 1985):

- Payroll service had no right to control.
- Special employer exclusively responsible for workers' compensation benefits.
- Industrial Commission lacked jurisdiction to enforce indemnification agreement.

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