

**JOURNAL RECORD ARTICLE
AUGUST 9, 2010**

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TRULY INDEPENDENT?

Hard economic times call for creative solutions by employers searching for ways to cut costs. Some options are admittedly more draconian than others, for example a reduction in force. Other options require patience from the work force, such as a wage freeze or temporary reductions in time and or pay.

One option that seems to be more in vogue as of late is classifying workers as independent contractors. The draw is simple. Independent contractors are not treated like regular employees. They are not entitled to fringe benefits, such as health insurance, 401(k) benefits, paid time off, vacation and pension plans, to name just a few. And, perhaps most importantly from a cost-cutting perspective, they are not entitled to overtime wages.

Sounds like a simple solution, right? Why don't employers just convert entire segments of their workforce into independent contractors and reap the savings? The answer to that riddle can be found in the legal definition of an independent contractor.

You see, it is not enough to just call a worker an independent contractor, send him or her a 1099 tax form at the end of the year for their wages and let the back patting begin. That is because under federal and state law there are specific factors that must be met in order for a worker to truly be considered an independent contractor.

For instance, is the independent contractor relationship in writing? Although this factor is not dispositive of the entire issue, it certainly helps to have a contract in writing with the worker that establishes the nature of the relationship and dispels any notion that an employer-employee relationship has been formed instead.

Next, you need to ask yourself who is controlling the work? Are explicit instructions being given to the worker on how to perform his or her work, or does discretion over when and how to do the job lie solely with the independent contractor? Similarly, what investment does the worker have in the job? Do they purchase their own uniforms? Do they provide their own tools for their trade? Do they set their own hours? Is the work they are performing integral to your business, or does it lie in the periphery of the primary purposes of the employer?

These are just a few of the litany of factors reviewed by the federal or state Department of Labor when assessing whether an employment relationship exists. The bottom line, as expressed by Oklahoma's Department of Labor, is to, "determine the underlying economic reality of the situation, and whether the individual is economically dependent on the supposed employer."

In other words, it is much easier said than done to re-classify a portion of your workforce as independent contractors. So, if necessary, keep looking for creative ways to save a buck. Just

be aware that while independent contractors can be a useful weapon in the cost-cutting arsenal, it is a fact intensive argument to justify the use of an independent contractor classification. Thus, the decision to use independent contractors should only be undertaken after close scrutiny of the job to be performed, and the manner in which it will be ultimately discharged.