

EMPLOYEE-OR INDEPENDENT CONTRACTOR

SUMMARY

Many tooling and precision machining shops, which are finding it difficult to hire and/or retain skilled employees, have been turning to highly skilled people to work in their shops for a predetermined fee. If these skilled people are truly independent contractors, the Company is required to do no more than pay their fee and send them an annual 1099 miscellaneous income form. But if they are determined to be employees-as opposed to independent contractors-the Company must pay Social Security (FICA), Federal Unemployment taxes (FUTA) and withhold federal, and where appropriate, state and city earnings tax. In addition, a barrage of other rules and regulations applicable to employees must also be followed. Failure to properly classify a person as an employee would lead to taxes, interest and penalties, as well as other problems associated with the Department of Labor rules and regulations, state laws and the like.

The most common questions federal and state investigators use to determine whether a person working for you is an employee or truly an independent contractor are outlined below. The more "yes" answers you give, the greater the likelihood the contractor will be classified as an employee.

1. Does the company tell the worker when, where and how to perform the work?
2. Did the company train the worker in order to have the job performed properly?
3. Is the service performed for the company directly related to the product produced, or is it tangential to the company mission?
4. Can this person delegate work to other persons employed by the employer?
5. Is the worker prohibited from hiring and supervising his own employees?
6. Does the worker work for you on a regular and continuous basis?
7. Does the company set the hours of service by the worker, or does the worker set his own hours?
8. Does the workers spend approximately 40 hours per week performing company work?
9. Is the work performed on company premises?
10. Does the company control the order and sequence of the work performed?
11. Does the worker periodically submit progress reports (orally or in writing)?
12. Is the worker paid hourly, weekly or monthly or is he paid upon completion of the job?
13. Does the company pay the worker's expenses, i.e., travel, material, parts and the like?
14. Does the company furnish equipment for the worker? Does the company furnish any tools for the worker? (Employees in the industry customarily furnish their own tools, hence this questions is directed at those tools which employees do not customarily furnish.)
15. If the worker furnishes tools, is his investment in his own tools sufficient or are the tools he furnishes pretty much in line with the tools customarily furnished by employees working at the trade?
16. Does the worker actually perform services for others or does his total output go to your firm?
17. Can the worker simply walk away from the job - or does he incur financial liability if he falls to perform?
18. If the worker produces a faulty piece of work, does the firm bear the cost of any of that error?
19. If there is a written agreement, does that agreement provide the worker with any benefits or rights traditionally granted to employees such as health insurance, profit sharing, holiday pay or the like?
20. Is the worker (or his firm) listed in the yellow pages of the telephone book? If so, is the telephone number listed your firm's telephone number? Using independent contractors to perform work that skilled

employees normally perform may be a great idea to help offset your inability to attract or retain highly skilled employees-but you must be certain you don't violate the law in so doing. Your counsel may be of great assistance to you in steering your plant through these treacherous waters.

This BMA was prepared by NTMA Labor Relations Counsel, Alan Berger, Partner; McMahon, Berger, Hanna, Linihan, Cody & McCarthy, St. Louis, MO.

The 1996 changes to Section 530 of the Revenue Code, even if they provide a safe haven for income tax purposes on the issue of independent contractor status, may not provide a safe haven for other Federal and State laws.