Worker Status: Independent Contractor, Employee, or Volunteer

Kendricks, Bordeaux, Keefe, Seavoy & Larsen, P.C.
Patricia E. Davis
Tami M. Seavoy
Introduction

The decision about whether to classify a worker as an employee, an independent contractor, or a volunteer has a number of consequences for both the worker and the employer. It determines whether the worker is covered by provisions of many laws.
What if the worker is an Independent Contractor?

- Provide the worker with Form 1099 rather than W-2 if you pay more than $600
- The worker pays both parts of the employment taxes
- Laws applicable to employees do not apply
Employers, who attempt to classify workers as independent contractors rather than employees, must satisfy two separate tests: One under state law and one developed by the IRS.

In both tests, no single factor controls; the situation is evaluated based on the totality of the circumstances.
Statutory Non-Employees

- Directors of a governing board, who are paid in this capacity, are treated as independent contractors.
- There are good reasons why you should not pay directors of a nonprofit corporation in Michigan.
- The right to indemnification applies to volunteer directors.
State law test factors include:

- Whether the business has control of the worker’s duties.
- Whether the business pays the worker’s wages.
- Whether the business has the right to hire, fire, and discipline the worker.
- Whether the worker’s duties are performed toward the accomplishment of a common goal.
- Whether the employer incurs any liability in the event of the termination of the relationship.
- Whether the work being performed is an integral part of the employer’s business or which contributes to the accomplishment of a common objective.
- Whether the position or job is of such a nature that the employee primarily depends upon the emolument for payment of his living expenses.
State law test factors include:

- Whether the employee furnishes his own equipment and materials.
- Whether the individual seeking employment holds himself out to the public as one ready and able to perform the tasks he performs for the business at issue.
- Whether the work customarily is performed by an individual as an independent contractor.
- Whether the business has a right to control the employment, pay wages, discipline the worker or hire and fire individual workers.
- Whether classifying the individual as an independent contractor or an employee will effectuate the objectives of the statute(s) in question.
Courts consider many facts, and these fall into three categories. No single fact controls:

- Behavioral Control
- Financial Control
- Relationship of the Parties
Behavioral Control

If the business retains the right to require the worker to comply with instructions, it is an indication of an employer-employee relationship, more specifically:

- If the worker can hire, supervise and pay assistants, it is an indication of an independent contractor relationship.
- Set work hours are an indication of an employer-employee relationship.
- If the worker is required to devote him or herself full time to the business, it is an indication of an employer-employee relationship.
- If the worker is required to work on the business premises, it is an indication of an employer-employee relationship.
- If the order or sequence of work is set by the business, it is an indication of an employer-employee relationship.
- If the worker supplies his own tools and equipment, it is an indication of an independent contractor relationship.
- If the business trains workers, it is an indication of an employer-employee relationship.
Financial Control

- If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees, it is an indication of an independent contractor relationship.
- If the worker could recognize a profit or loss other than wage loss, it is an indication of an independent contractor relationship.
- If the worker is paid for business and/or travel expenses, it is an indication of an employer-employee relationship.
If the worker’s services are essential to the business, it is an indication of an employer-employee relationship. If they are ancillary to the business, it is an indication of an independent contractor relationship.

If a continuing relationship exists between the worker and the business, it is an indication of an employer-employee relationship.

If the worker is required to give oral or written reports, it is an indication of an employer-employee relationship.

If the worker is paid by the hour, week or month, it is an indication of an employer-employee relationship. But payment by the job or by straight commission is an indication of an independent contractor relationship.

If the worker performs more than de minimis services for a multiple of unrelated persons or firms or makes services available to the general public, it is an indication of an independent contractor relationship.

If the business has the right to terminate the relationship without liability, it is an indication of an employer-employee relationship.
Failure to Deposit – multiply the amount of tax underpaid by the penalty percentage rate (based on # of days late)

Failure to File – Forms 940, 941 or 944 – 5% per month of unpaid tax on the due date, reduced by the failure to pay penalty for the same month

Failure to Pay – ½% per month of unpaid tax, then 1% per month after Notice of Intent to Levy

Interest (rates determined monthly)

Avoidance penalty 10%.
Relief from Penalties

You may be entitled to relief if:

- You have a reasonable basis for misclassifying a worker; and
- You filed your returns on a basis consistent with your treatment of the worker; and
- Similar workers were treated consistently
Asking the IRS for Help

Form SS-8 Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding
- It can take at least 6 months to get a determination
- If you regularly hire the same type of worker, this might be worthwhile
Workers Can File for Relief

- Workers can use Form 8919 to seek payment by the employer of the uncollected Social Security and Medicare Tax on Wages
Voluntary Classification Settlement Program

- Taxpayers have an opportunity to reclassify their workers as employees for future tax periods
- Partial relief from federal employment taxes may be available
- Filing with Form 8952 to enter into a closing agreement with the IRS
Other Federal Laws Implicated by Misclassification

- Fair Labor Standards Act
- Family Medical Leave Act
- USERRA (Military leave)
- ERISA (Benefits)
- COBRA
- EEOC and discrimination law
State Laws Implicated by Misclassification

- State Unemployment Insurance
- Workers’ compensation
- State Paid Medical Leave Act
Volunteers/FLSA

- A volunteer generally will not be considered an employee for FLSA purposes if the individual volunteers freely for public service, religious or humanitarian objectives, and without contemplation or receipt of compensation.
- Individuals generally may not volunteer in commercial activities run by a non-profit organization, such as a gift shop.
- Volunteers serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees.
- Paid employees of a non-profit organization cannot volunteer to provide the same type of services to their non-profit organization that they are employed to provide.
Certain employees are not entitled to overtime pay – executive, administrative and professional employees.

DOL announced the final rule, which will be effective on January 1, 2020.

- Raising the “standard salary level” from the currently enforced level of $455 to $684 per week (equivalent to $35,568 per year for a full-year worker);
- Raising the total annual compensation level for “highly compensated employees (HCE)” from the currently-enforced level of $100,000 to $107,432 per year;
- Allowing employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the standard salary level, in recognition of evolving pay practices.
Employers may not prohibit employees from discussing or sharing wage information with other employees.

Employers may not require employees to use direct deposit.

Employers may not withhold sums from employee’s wages without written authorization from the employee or a court order (garnishment).
State Laws regarding Benefits

- Under Michigan’s Wage and Fringe Benefit Act, MCL §408.471 et seq, an employer is required to pay wages on a weekly, biweekly, semi-month or monthly basis.
- Michigan’s Paid Medical Leave Act, MCL §408.961 et seq, requires employers with 50 or more individual workers, regardless of full or part-time status, to provide paid medical leave.