

THE BASICS

Hiring an employee versus an independent contractor makes a difference.

- **For employees an association may be required to:**
 - ⇒ Withhold state and federal taxes
 - ⇒ Pay for FICA or Medicare
 - ⇒ Make payments to worker's compensation or unemployment programs
- **By hiring an independent contractor, an association can avoid tax and insurance obligations and also can take advantage of limited liability for any negligent acts of the independent contractor.**
- **Misclassifying an employee as an independent contractor can expose an association to legal liability including, but not limited to:**
 - ⇒ Tax consequences
 - ⇒ Liability under the Federal Labor Standards Act
 - ⇒ Substantial penalties under state and federal law
- **To avoid misclassification, associations should:**
 - ⇒ Ensure contracts identifying worker as an independent contractor also carefully defines a role in which the worker maintains control over his or her work, method of performance, time of performance and materials/equipment used.
 - ⇒ Limit independent contractor relationship to project contracts, and avoid using independent contracting for full time positions typically held by employees

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Independent Contractor is More Than Just a Label!

Because of the benefits offered by hiring an independent contractor as opposed to an employee, many associations choose to enter into contracts for services with an independent contractor. However, even though the contract may identify the service provider as an "independent contractor," sometimes the actual relationship between the contractor and the association is an employer-employee relationship. In determining whether a service provider is an employee vs. an independent contractor, a court will look beyond the label in the contract and will look at the actual relationship of the parties.

Federal Law: The IRS's 20-Factor Test

- The IRS has a 20 factor test to determine whether or not a worker is actually an employee or an independent contractor. This test is generally referred to as the "right to control" test.
- The factors considered by the IRS are as follows: (1) level of instruction; (2) amount of training; (3) degree of business integration; (4) extent of personal services; (5) control of assistants; (6) continuity of relationship; (7) flexibility of schedule; (8) demands for full-time work; (9) need for on-site services; (10) sequence of work; (11) requirements for reports; (12) method of payment; (13) payment of business or travel expenses; (14) provision of tools and materials; (15) investment in facilities; (16) realization of profit or loss; (17) work for multiple companies; (18) availability to public; (19) control over discharge; (20) right of termination.

Georgia Law: The "ABC" Test

- For the purposes of determining whether an employer is responsible for such state-required mandates as unemployment insurance, Georgia employs a modified version of the "ABC test," or the "economic reality test." Under the Georgia law, a worker is considered an independent contractor if:
- The individual has been and will continue to be free from control or direction over the performance of their services, both under the individual's contract of service and in fact, and the individual is customarily engaged in an independently established trade, occupation, profession, or business;
- The individual and the services performed for wages are the subject of an SS-8 determination by the IRS and the determination was against employee status.
- To be an independent contractor, the worker must not only be engaged in an independently established profession, but also must be free of significant control or direction by the employer. In order to establish the latter portion of the test, courts look to the following key factors, among others: (1) a lack of territorial or geographic restrictions placed on the individual; (2) no prohibition placed on the individual from working for other companies or holding other employment contemporaneously; (3) the individual has no prescribed minimum hours to work or orders to be obtained; (4) the individual is free to accept or reject work without consequence; and (5) the individual has the discretion to set his or her own schedule and to control his or her work.

