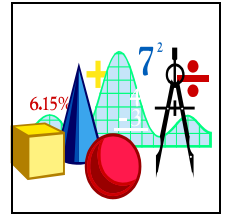


CONSTRUCTION LAWLETTER

For Industry Professionals, Officers, Managers, Trades and Suppliers



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EMPLOYEE OR INDEPENDENT CONTRACTOR ?

Business owners tempted to utilize workers as independent contractors rather than as employees may run the risk of defeating their own intended purpose. In an attempt to save money, conserve time and avoid extensive recordkeeping, an employer's misstep in classification of workers may result in severe tax penalties, from the local and regional authority, state and the federal government.

Basically, independent contractors ("IC's") are persons who are considered to be in business for themselves. Accordingly, businesses with IC's are not required to pay state and federal payroll taxes or other employee benefits; these exemptions can result in 20-30% savings in payroll costs alone!

directly to the IRS four times each year. However, if the Local, Regional, State or Federal governments (IRS) determine that the worker is actually an employee, the employer may be liable for back taxes, plus penalties ranging from 12 to 35 percent of the total tax bill.

The primary test in distinguishing between IC vs. employee is a **degree of control**. To avoid such serious errors by employers, Ohio law provides the test criteria: "...Whether someone is an **employee** or an **independent contractor** is ordinarily an issue to be decided by the trier of fact. The key factual determination is who had the **right to control the manner or means of doing the work**. (Emphasis added.)

In *Gillum v. Indus. Comm.* (1943), [141 Ohio St. 373](#), 25 O.O. 531, 48 N.E. 2d 234, this court set forth the following test in

paragraph two of the syllabus:

"Whether one is an **independent contractor** or in service depends on the facts of each case. The principal test applied to determine the character of the arrangement is that if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant (employee), while if the manner or means of doing the work or job is left to one who is responsible to the employer only for the result, an **independent contractor** relationship is thereby created."

to control must be made by examining the individual facts of each case. The factors to be considered include, but are certainly not limited to, such indicia as who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools and personnel used; who selects the routes travelled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts. " *Bostic v. Connor* (1988), 37 Ohio St.3d 144.

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Honest people will respect us for our merit; the public, for our luck.

Francois, Duc de La Rochefoucauld (1613-80)

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