

# REMODELERS & THE LAW



BY NANCY A. CHILLAG

## Independent Contractor or Employee?

For years, employers have tried to classify their workers as independent contractors because it saves them money. If the employer can classify someone as an independent contractor, he or she doesn't have to withhold taxes from that person's paycheck and consequently, doesn't have to pay the employer contribution for social security, disability and unemployment, as well as many state taxes. In addition, the employer

can categorize him/her as an independent. However, you must apply the other factors *before* you make that determination.

**2. Training:** Do you train your workers? Independent contractors are usually hired because of their expertise and thus should not need training.

**3. Termination:** Can you fire workers at will? An independent contractor usually works under a contract which specifies that he/she will perform a certain task by a certain date for a set amount. If you fire an independent contractor, you can be held liable for breach of contract.

**4. Review of work:** Do you regularly review the person's work, making suggestions along the way? Independents are usually provided with plans and are told to do a particular item of work. He/she determines the methods to be used, buys materials, hires crews and schedules inspections. The employer reviews the final product to make sure it conforms to specifications.

**5. Other employers:** Does the worker only work for you? Independents usually offer their services to several contractors at once, often having many projects running simultaneously.

**6. Length of work:** Is the worker assigned to various sites on a daily basis? Independent contractors are usually hired for a specific project, and when it's finished, so is their work. They might work on multiple projects for one employer, but their work is tied to specific projects.

Savings derived from classifying a worker as an independent contractor may not be as great as you think. Most worker's comp insurance companies

require clients to provide a list of their independent contractors *and* proof that the contractor is covered by a separate worker's comp policy. If the certificate doesn't exist upon audit, the insurance company back-charges the employer for the cost to cover the worker. In addition, the IRS is put on audit alert if they receive a 1099 copy from you for a person who does not include a Schedule C business income and expenses form with his tax return. Worse yet, if that person does not file a tax return at all, the IRS will assess *you* for the taxes you should have withheld, even though you already paid the employee that amount, along with interest and penalties.

Also keep in mind that if that worker is hurt on the job, he'll expect you to pay his medical bills and lost wages. If he's not covered under your worker's comp policy, it will come from your pocket. He may even file a claim against the homeowner for whom the worker was performing services at the time of the injury, in order to collect from their homeowner policy. This will raise numerous problems with your client, such as breach of contract, failure to maintain adequate insurance, licensing violations, etc. ♦

**Editor's note:** Submit your questions to *QR* for an upcoming legal Q&A column.

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doesn't have to cover an independent contractor under his worker's compensation plan, which can mean a tremendous savings.

The IRS and worker's comp insurance companies know they've been duped, and getting caught using the wrong designation can mean serious penalties and/or cancellation of your worker's comp insurance.

The IRS has issued 20 factors to determine the proper employment classification; those listed here are the most relevant to remodelers. (Call 516-845-2700, ext. 258, for the complete list.)

**1. License:** Since most states require contractors to be licensed if they "independently" contract themselves for work, an unlicensed worker could never be considered an independent contractor. A lot of employers then assume that if a worker has a construction license, it's safe to