

# MARKS & WEINBERG, P.C.

## SALES AGENTS AND BROKERS: INDEPENDENT CONTRACTORS OR EMPLOYEES? (1995)

One issue that has many ramifications for leasing companies and other businesses is whether "independent" brokers and sales agents are to be considered independent contractors or employees for legal and tax purposes.

Among other things, an employee is generally considered to be an "agent" of his or her employer, with power to bind the employer to contracts and other obligations in the ordinary course of the employer's business. Parties are permitted to rely on representations of fact made by employees under many circumstances, which may include representations regarding the utility and value of leased equipment and the employer's policies with respect to lease defaults, late fees, etc.

From a tax perspective, payments to an employee are subject to state and federal withholding taxes, as well as various other obligations, such as worker's compensation and unemployment insurance payments. Failure to adhere strictly to these requirements may expose the employer to significant penalties.

By contrast, an independent contractor is deemed to be a person in business for himself or herself. Absent some specific showing of authority, the independent contractor generally does not have authority to bind the party with whom he works to any form of agreement or to make any representations on that party's behalf. Moreover, payments to an independent contractor are generally subject to a "1099", rather than withholding tax.



Unfortunately, there are few common legal issues more complicated than the determination of whether a worker is an employee/agent or an independent contractor. Many practices commonly engaged in by leasing companies and brokers could be used by a plaintiff or tax authority to claim that an outside "independent" broker is, in fact, an employee.

While there is no universal list of factors we can cite for insulating a leasing company or broker from liability for the acts of outside sales persons, or to satisfy the government that such persons are independent contractors, there are a number of factors which should be considered in entering into any new relationship.

We regularly recommend that a written agreement between company and salesperson be signed. This is important for a number of reasons outside of the independent contractor-employee issue, of course. Any such contract should clearly indicate that the worker is not an employee and that the company will not withhold taxes unless so directed by its counsel or the government. This at least puts the worker on notice that he or she is responsible for paying taxes and that no deductions are being made from his or her commission checks.

A common mistake is to give outside sales persons business cards indicating that they are regular employees. Any business card should clearly state that the salesperson is an "independent" salesperson or broker. Under no circumstances should the word "agent" or any indication that the person is an officer ("vice president", "director of sales", etc.)

The following factors are used by the Internal Revenue Service in determining whether a worker is an employee or an independent contractor. We have modified the tests for clarity. A "yes" answer is a factor in favor of the person being deemed an employee:

1. **Control by employer** - does the employer have the power to dictate how work is to be performed?
2. **Training** - does the employer provide training?



3. **Integration** - is the worker's services fully integrated into the employer's operation?
4. **Delegation** - must the worker personally perform all services? (In other words, is the worker prohibited from delegating his or her responsibilities to another person?)
5. **Assistants** - is only the employer (and not the worker), permitted to hire and supervise the worker's assistants?
6. **Continuing relationship** - is the relationship between the parties continuing (as opposed to periodic)?
7. **Routine work hours** - is the worker required to work set hours?
8. **Time required** - must the worker work full-time?
9. **Place of performance** - must the work be performed on the employer's premises and must the worker travel on a specific designated route when working outside and returning to the employer's premises?
10. **Routine pattern** - is work performed in a routine pattern or sequence?
11. **Reports** - must the worker submit regular reports as to status or progress?
12. **Payment method** - does the worker receive regular payment (hourly, weekly, etc.)?
13. **Payment of expenses** - does the worker receive payment or reimbursement of the worker's expenses?
14. **Tools/materials** - does the employer furnish his or her own tools and equipment?



The following additional factors are considered by IRS, as indicated.

15. **Investment** - investment by a worker in the business indicates independent contractor status.
16. **Profit/loss exposure** - a worker who may realize profit or suffer loss from performance is more likely to be considered an independent contractor.
17. **Multiple engagements** - a worker who may work for more than one unrelated employer is more likely to be considered an independent contractor.
18. **Services available to general public** - an independent contractor, rather than an employee, is generally deemed to make his services available to the general public.
19. **Termination right.** If the employer may discharge the worker, or if the worker may freely terminate the arrangement, the relationship is more likely to be found that of employer and employee.

The clear trend in both tax and general law is to find an employment relationship to exist. Companies should beware the situation and be prepared, with appropriate riders to errors and omissions, insurance policies and other protections, for the possibility that adverse consequences will exist. When in doubt, contact your lawyer or accountant and be prepared to answer questions along the lines of those contained above.

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