

HOW TO DETERMINE WHETHER A WORKER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR

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Colorado law presumes that any individual who performs work for a company is an employee. In order to prove an individual is actually an independent contractor and not an employee, several important factors and criteria must exist. These criteria include but may not be limited to:

1. The company and the independent contractor must have a signed written contract which is signed by both entities and must be notarized.
2. The written contract states the purpose and intent of the written contract is to establish an independent contractor relationship.
3. The written contract must contain the following language in bold type: The independent contractor is not entitled to workers' compensation insurance benefits by the company the independent contractor is performing work for; the independent contractor agrees he or she is obligated to pay all federal and state income tax on any monies earned pursuant to this contract; the independent contractor is responsible for paying his or her own unemployment taxes to both the state and federal government.
4. The independent contractor must be free from control and direction in the performance of all services performed in the contract. This means that the company cannot tell the individual: when or how to do a particular job; or provide tools or equipment to the independent contractor.
5. The independent contractor is customarily engaged in an independent trade, occupation, profession or business related to the services being provided under the written contract. In other words, the independent contractor must perform similar services for other companies.
6. Under the terms of the written contract, the independent contractor must be paid on a fixed or contract rate. This means the independent contractor cannot be paid on a set salary or an hourly rate.
7. The checks issued to the independent contractor must be made out to the name of the independent contractor's business or trade name and not to an individual.
8. It is also recommended that the written contract is for a specified time period and is not an open-ended agreement.
9. The contract must require the independent contractor to carry his/her own business insurance.

These same guidelines generally are also used by the IRS and the U.S. Department of Labor, when determining whether an individual is properly categorized as an independent contractor.

Currently, the U.S. Department of Labor is targeting industries and companies which it believes have incorrectly and improperly classified workers as independent contractors instead of employees.

If you are considering using a worker as an independent contractor instead of an employee, you need to make sure that all the above-listed criteria exist within a written contract, and represent the true facts of the working relationship. Otherwise, it could be found by the state or federal government that you have improperly categorized an individual as an independent contractor, when in fact the worker is an employee. This could subject your company to liability for back taxes, penalties, interest and fines.

*If you have any questions or concerns about the current independent contractor laws, please feel free to contact **Michelle R. Magruder or Timothy L. Nemechek of Nemechek & Magruder, LLC, 50 S. Steele Street, Suite 755, Denver, Colorado 80209, 303-414-2200.***

Nemechek and Magruder provides employment law and general risk management services to dealerships throughout Colorado.

Disclaimer: *The above is a summary of key provisions in Colorado law and is not intended as legal advice. This information is not intended as a substitute for independent and individualized legal advice from your own attorney*