

Employees versus Independent Contractors in New Hampshire - Do you know the law?



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Most employers would prefer to treat their help as 'subcontractors', and not 'employees'. Why? Because they want to avoid the headaches and additional social costs our society puts on them when they have employees, such as workers compensation insurance, unemployment compensation, overtime.

There are many government agencies that will try to challenge whether someone you're hiring is really an employee, particularly if that individual should get hurt on the job, or file an unemployment claim. So, before going on, let me state that if you simply treated all your hired help as employees, filed all your payroll tax obligations, and obtained workers compensation insurance that covered all your staff, you don't need to worry about the distinction between an independent contractor versus an employee.

If you insist that the people you pay are legitimate subcontractors and it's okay to just pay them and give them a 1099, perhaps because of 'industry standard' or some other belief, you should keep reading.

Both the IRS and the state of New Hampshire have made recent changes in the criteria used to distinguish independent contractors from employees. In addition, the IRS has announced they will be doing many more payroll audits of random small businesses in the months ahead, while many state agencies continue to crackdown on employers who erroneously classify an individual as an independent contractor to avoid payroll taxes, unemployment and workers compensation insurance.

Since New Hampshire's definition of a subcontractor is far more restrictive than the Federal government, this article will just present New Hampshire's rules. Additional articles are planned to discuss the Federal rules.

In New Hampshire, you must meet all 12 criteria in a [12-prong test](#) set out in the state's workers' compensation and unemployment compensation laws to be considered an Independent Contractor. Since I find the state's tests very difficult to understand for the layman, I've taken some liberties to improve readability. I have substituted the word 'Independent Contractor' when the State refers to a 'person' and removed any references to the word 'employer' and replaced that with 'hiring party'.

To be considered an Independent Contractor, you must pass *all* twelve of the following tests:

1. The Independent Contractor possesses a federal employer identification number or social security number.
2. The Independent Contractor has control and discretion over the *means and manner* of the performance of the work, rather than the *means or manner* by which the work is performed.
3. The Independent Contractor has control over the time when the work is performed. The time of performance is not being dictated, except for completion schedules, a range of work hours or maximum number of work hours to be provided by the Independent Contractor, and in the case of entertainment, the time such entertainment is to be presented.
4. The Independent Contractor hires and pays their own assistants, if any, and to the extent such assistants are employees of the Independent Contractor, supervises the details of the assistants' work.
5. The Independent Contractor holds themselves out to be in business for themselves.
6. The Independent Contractor has continuing or recurring business liabilities or obligations.

7. The success or failure of the Independent Contractor's business depends on the relationship of business receipts to expenditures. Essentially, this means that there needs to be a risk of loss, that it's legitimately possible to have expenses that exceed income.
8. The Independent Contractor receives compensation for work or services performed and remuneration is not determined unilaterally by the hiring party.
9. The Independent Contractor is responsible for the main expenses related to the service or work performed. However, this shall not prohibit the hiring party from providing the supplies or materials necessary to perform the work.
10. The Independent Contractor is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.
11. The Independent Contractor supplies the principal tools and means used in the work, except that the hiring party may furnish the tools or means that are unique to the employer's special requirements or are located on the employer's premises.
12. The Independent Contractor is not required to work exclusively for the hiring party.

The above rules have been in effect since January 1, 2008.

Four state agencies are now coordinating efforts to enforce laws that require most workers to be classified as employees and not as independent contractors.

The agencies — Employment Security, Labor, Insurance and Revenue Administration — are on the lookout for businesses that pay someone as an independent contractor when in fact he or she is an employee—as a way to avoid paying payroll taxes and workers' compensation insurance.

In fact, the state has a new web site — www.nh.gov/nhworkers that invites reports on alleged misclassifications. The site states: "If you think an employer is committing fraud by misclassifying its workers or is committing violations of New Hampshire State laws related to the employment of workers, it is important that you let us know about it."

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