

Independent Contractor or Employee?

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May 5, 2015



Many owners' associations, especially the larger associations, pay workers to perform certain tasks for the benefit of the community. The kind of tasks these workers may perform ranges from landscaping, maintenance, and construction to teaching classes and operating recreational facilities. Paying workers to perform these tasks for the association is common and often necessary – the board and community volunteers cannot be expected to perform all the duties necessary to maintain and operate a community. However, the classification of workers hired by the owners' association is critical and associations often do not pay much attention to the classification until it is too late. Specifically, an owners' association must determine when it hires a worker whether that worker will serve as an employee or an independent contractor.

Owners' associations, like many businesses, often prefer to hire independent contractors instead of employees for some of the following reasons:

- Owners' associations are not required to withhold income taxes or pay unemployment insurance, social security, or Medicare taxes, or make Federal Insurance Contributions Act ("FICA") contributions for independent contractors;
- Independent contractors are not eligible for overtime and are not covered by minimum wage laws;
- Independent contractors generally are not eligible for employee benefits such as vacation, health insurance, and retirement benefits; and,
- Independent contractors generally are not eligible for leave under the Family and Medical Leave Act.

For the reasons stated above, it is easy to understand why an owners' association would prefer to hire someone to work for it as an independent contractor instead of an employee. However, associations often misclassify employees as independent contractors. If an association makes this mistake, the potential liabilities include:

- The owners' association may be required to make payments of backed pay and overtime compensation for a period of up to two years;
- The owners' association may be required to pay the full amount of the employee's income tax which should have been withheld, the FICA tax, and an additional penalty; and,
- There also is potential liability for attorney fees and even criminal sanctions against the association.

In order to avoid these potential liabilities, it is imperative that owners' associations understand the difference between an employee and an independent contractor. While there are many factors to consider, the main test is whether the worker is dependent economically on the association. The greater the control the association has over the worker, the more likely the worker will be considered an employee. For example, if an owners' association hires someone to perform the landscaping duties on the association's common elements and then: (i) sets the worker's schedule, (ii) provides the worker with the tools necessary to perform the landscaping duties, and (iii) engages the worker for a very long or indefinite period of time, the worker

may very well be an employee regardless of whether the association considers the worker to be an independent contractor.

It is very easy to misclassify a worker, so associations should take any and all steps necessary to understand the distinction between an employee and an independent contractor and clearly establish the relationship with the worker as either an independent contractor relationship or an employer/employee relationship. If the intent is to establish an independent contractor relationship, a written agreement between the association and the worker can help. An independent contractor agreement should include the following terms:

- The worker must certify that he or she has the required skills to perform the task; The manner of performing the work (location and schedule) is up to the worker;
- Compensation should be based on results and paid as a fee and not a salary or wage;
- The worker is responsible for complying with any IRS tax requirements;
- The worker must supply his or her own supplies and be responsible for the cost; and,
- The worker is not entitled to any traditional employee benefits.

While entering into an agreement will not, by itself, prevent a misclassification it will, at the very least, help to establish the terms of the working relationship for both the association and independent contractor/employee.

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