



MM POSITION PAPER: EMPLOYEE OR CONTRACTOR

Miller Management position papers are a compilation of our staff's research, education, training classes and seminars attended, over 30 years field experience and interpretation of current laws as we understand them. The information contained in this paper is not legal advice and is intended to be used as general information to help your organization formulate your organization's guidelines. It is understood that your organization is legally responsible for all policies and procedures, and their legal basis.

It should be noted that these guidelines do not apply to ministers who are dual-status filers, see our position paper of "Ministerial Dual Status Employment."

(GoodFaithAccounting.com)

Application: Many churches like to classify people as independent contractors (custodians, nursery workers, summer help etc.) as opposed to employees to avoid paying the employer side of social security tax, reduce their payroll processing expenses and they believe it will save the church money on worker's compensation insurance. The IRS strongly prefers to have most people classified as employees. The following is an attempt to clarify the issues.

In order for a person to work at a church legally as an independent contractor, we believe it is prudent to consider the following guidelines:

- 1) The person (company) must send an invoice for services rendered to the church and it must be paid from accounts payable.
- 2) It cannot be their only source of income.
- 3) The church cannot substantially direct the person's duties; the church can only give them overall tasks to complete.
- 4) They cannot have an office at the church that is their primary office.
- 5) The church cannot control or set their hours that they work.
- 6) Since their "company" provides the service, they can send anyone to do the job.
- 7) The church needs to have a written contract in place including cost, delivery of services, duration (i.e. six months, one year, etc.) and a termination clause.
- 8) They cannot participate in any employee benefits plans (insurance, retirement plans, etc.)



- 9) The contractor must provide annual proof of worker's compensation and liability insurance naming the church as additionally insured or the church could be held liable in the event of a claim.
- 10) The church must issue a 1099 at the end of the year for all contract wages paid if the total amount for the year exceeds \$600.00. *No payments should be made until an accurate and fully completed W-9 is completed by the contractor and on file at the church.*

If it is difficult to determine whether a person falls into the category of employee or the category of contractor, we recommend *against* the use of independent contractors (that regularly work at the church) because we believe it can create the following problems for the church:

- 1) Less control over the position.
- 2) Leaves the church open to an IRS challenge, which the church only has a 50/50 chance of defending, not to mention the cost and hassle of litigation.
- 3) In the event of insurance claims, the church may encounter issues with:
 - a. Worker's compensation coverage
 - b. Liability insurance coverage
 - c. Sexual misconduct coverage
- 4) Church is free to dispute contract with the independent contractor, if failure occurs.
- 5) Based on how the individual/company is filing their taxes, it could bring an unwanted tax audit to the church.

Below is additional guidance from the IRS on the determination of an
Employee vs. Contractor:

Excerpts from IRS Publication 15-A: Employer's Supplemental Tax Guide

An employer must generally withhold federal income taxes, withhold and pay social security and Medicare taxes, and pay unemployment tax on wages paid to any employee. An employer does not generally have to withhold or pay any federal taxes on payments to independent contractors.

Common-Law Rules

Under common-law rules, anyone who performs services for you is your employee if you have the right to control what will be done and how it will be done. This is so even



when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.

To determine whether an individual is an employee or an independent contractor under the common law, the relationships of the worker and the business must be examined. In any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered.

Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties. These facts are discussed below.

1. Behavioral control

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of:

Instructions that the business gives to the worker. An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work.

- + When and where to do the work.
- + What tools or equipment to use.
- + What workers to hire or to assist with the work.
- + Where to purchase supplies and services.
- + What work must be performed by a specified individual.
- + What order or sequence to follow.

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

Training that the business gives to the worker. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

2. Financial control

Facts that show whether the business has a right to control the business aspects of the worker's job include:

The extent to which the worker has unreimbursed business expenses.

Independent contractors are more likely to have unreimbursed expense than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services that they perform for their employer.

The extent of the worker's investment. An independent contractor often has a significant investment in the facilities or tools he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.

The extent to which the worker makes his or her services available to the relevant market. An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.

How the business pays the worker. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is often paid a flat fee or on a time and materials basis for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.

The extent to which the worker can realize a profit or loss. An independent contractor can make a profit or loss.

3. Type of relationship

Facts that show the parties' type of relationship include:

- + Written contracts describing the relationship the parties intended to create.



- ✦ Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.
- ✦ The permanency of the relationship. If you engage a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that your intent was to create an employer-employee relationship.
- ✦ The extent to which services performed by the worker are a key aspect of the regular business of the company. If a worker provides services that are a key aspect of your regular business activity, it is more likely that you will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

IRS help

If you want the IRS to determine whether or not a worker is an employee, file Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, with the IRS.