



# **Nonprofit Organization Relationships: *Employee or Independent Contractor?***

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## **Nonprofit Organization Relationships: Employee or Independent Contractor?**

### Employees At-Will

General Rule: Where the employer and the employee have not contracted for a definite term of employment, the employment relationship will generally be treated as "at will." At-will employees can quit, or can be terminated, at any time and for any reason not prohibited by law.

Public Policy Exceptions to General Rule: At-will employees may not be terminated for any reason which would constitute:

- 1) Employment discrimination
- 2) Refusing to commit perjury
- 3) Filing a workers' compensation claim
- 4) Serving on a jury
- 5) Refusal to commit or participate in an unlawful act or crime
- 6) "Whistleblowing" (e.g., OSHA regulations)

Practical Tips for Employers:

- 1) Courts have held that employees may have certain rights regarding termination, thus preventing termination "at will," even without a formal employment contract. Therefore,

have clear, express statements in employee handbooks, such as the following:

"Employees understand that their employment relationship may be terminated at either party's discretion, for any reason not prohibited by law. This handbook is neither a contract, nor does it create express or implied contractual rights. Rather, it is intended to provide guidance to employees in their day-to-day business relationship with employer."

2) Have employees sign an acceptance form when they receive the handbook, indicating that they have read and understood the above statement.

### Independent Contractors

General Rule: Independent contractors are only subject to direction and control as to the result to be accomplished, not as to the means and methods for accomplishing the result.

Tax Consequences: Employers do not withhold any taxes or other payments for independent contractors.

IRS' 20 Factors: The IRS lists 20 factors it considers when determining whether an individual will be classified as an employee or as an independent contractor:

1) Degree of or right to control;

- 2) Right to discharge;
- 3) Right to delegate work;
- 4) Ability to hire, supervise assistants;
- 5) Payment practice;
- 6) Training practice;
- 7) Skill level;
- 8) Duration of relationship;
- 9) Control over hours of work;
- 10) Independent trade;
- 11) Furnishing of tools;
- 12) Place of work;
- 13) Treatment of profits and losses;
- 14) Intent of parties;
- 15) Services provided for more than one employer;
- 16) Sequence of work;
- 17) Reports, attendance at meetings required;
- 18) Same type of work as employees;
- 19) Type of work part of day-to-day operations;
- 20) Industry customs

Agency Law Consequences: Generally speaking, employers are not liable for losses or injuries caused by an independent contractor's negligence.

#### Practical Tips for Employers:

- 1) Have an independent contractor agreement with the individual. While this is not considered conclusive, it is

among the factors considered by the IRS. Make clear in the agreement that the individual is responsible for payment of taxes, etc. Keep a good paper trail.

2) Err on the side of employee status. If the IRS later reclassifies the individual as an employee, the IRS will assess the unpaid taxes and stiff penalties against the employer and/or any "responsible party" (e.g., officer).

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