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EMPLOYMENT CONTRACT PROVISIONS THAT CAN PROTECT YOUR BUSINESS

With competition for customers becoming more fierce each day, a business owner has to consider how he or she can protect the business from being eroded by employees who leave from time-to-time, regardless of whether those employees leave voluntarily or involuntarily. This article will be the first of a series of articles that will address contractual provisions that can protect the business owner from having customers or confidential information compromised by the company's own employees, ultimately, undermining the profitability of the business.

An employment contract may not make sense for every employee of a company. The owner may wish to enter into a written contract only with employees who have key positions and/or knowledge of the company's confidential or proprietary information. There are a host of provisions that an owner can incorporate into an employment contract, once the owner decides what type of person to hire and whether to enter into a contract.

Before deciding the precise provisions that an owner may wish to insert into an employment contract, the owner must first decide if the business should hire an individual in the first instance. The considerations behind a decision to hire an employee, instead of having an independent contractor relationship, will be the focus of this article. Preparing an employment contract, including terms that can facilitate a long-term relationship with an employee, will be the subject of future articles.

Characteristics Of An Employee And An Independent Contractor

Before analyzing those considerations, however, we will first discuss the general characteristics of an employee and an independent contractor. These characteristics of each may be obvious, but the characteristics may enable the owner to determine whether to hire an employee or establish an independent contractor relationship.

An employee typically includes the following characteristics:

- Employee is covered by federal, state and local employment laws that regulate payment of compensation, overtime and other works rules
- Employee works for one company (the employer)
- Employee works at employer's place of business or, if working remotely, works at a location known to the employer
- Employee become eligible for unemployment benefits, if laid off
- Employer dictates the direction of the employee
- Employer controls all method and manner of work
- Employer withholds taxes, FICA (social security and medicare) and has the duty to collect the employee's share of the same from the employee



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- Employer generally offers to employee health benefits, vacation pay, retirement savings options
- Employer pays unemployment and worker's compensation insurance

An independent contractor typically includes the following characteristics:

- Works independently, with less control by employer over the method and manner in which work is to be completed
- May works for others
- May provide services to more than one company
- May work for a fixed term
- Pays own taxes and FICA
- Not eligible for benefits
- Sets own hours
- Provides own tools or equipment
- Pays for own operational costs

Considerations In Determining Whether To Hire An Employee or Independent Contractor

Now that we have discussed the characteristics of an employee and an independent contractor, the owner should determine which status best fits the company's operations. The considerations for determining which is the best decision for the company include:

- Employer needs to strictly control the work
- Employer needs to closely supervise the worker
- Employer needs to closely monitor the hours of work and equipment used to complete the work
- Is the work a long or short-term need for the company?
- Does the work require constant, dependable expertise?
- Does the work require continuity of service?
- Can the work be completed in a defined period of time?
- Is the work essential or central to the business?
- Does the work require unique professional expertise?
- Is there a certain corporate culture that the individual should have in order to effectively complete the work?
- Does the company require flexibility with its workforce?
- Is training required?

Please beware that simply because an employer may have labeled a person an "independent contractor" does not necessarily make it so because courts will perform their own analysis of the facts in order to reach a conclusion on the status of an individual.



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Once the owner has determined whether to hire either an employee or independent contractor, the owner must determine whether or not a contract is necessary. Typically, an employer will want to have a written contract with an independent contractor, but may not necessarily want a contract with all employees. The next article of this series will discuss the general provisions of contracts with employees and independent contractors.