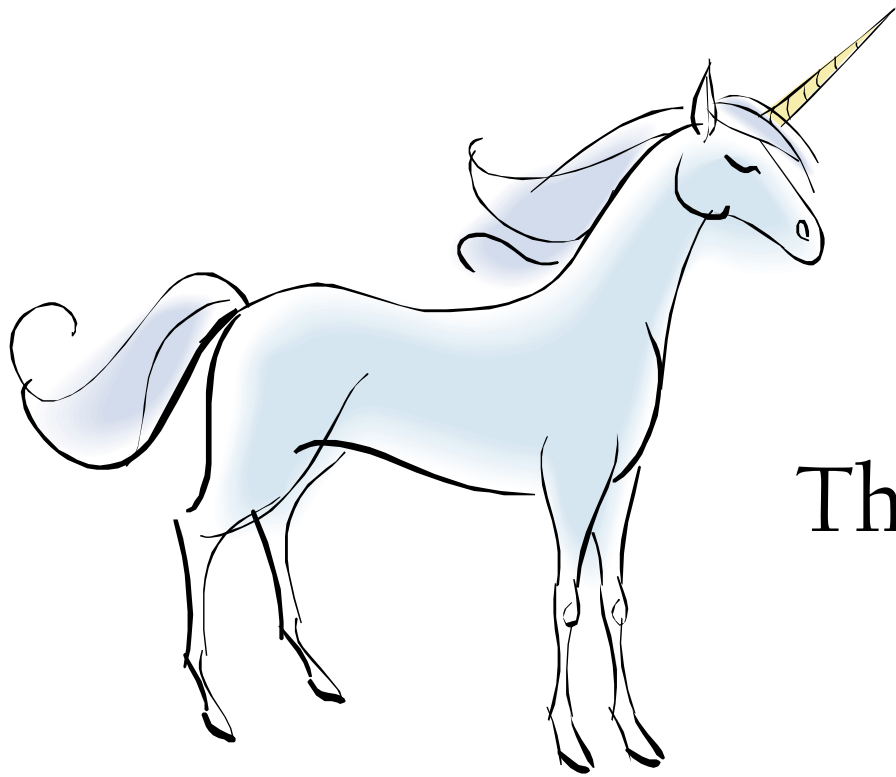


Independent Contractor v. Employee

Guidance for Law Firms and Their Clients

August 23, 2024

Wendy Anderson and Denise Blommel



The 1099 Employee

1099 vs. W-2– why should I care?

- Taxing authorities presume all workers are employees
- No insurance claim or lawsuit due to work injury
- Business owner has personal liability for:
 - Misclassification
 - Unpaid taxes
 - Underpayment of wages
- May need to defend classification as contractor in dispute
- The reality of the relationship will be paramount

Laws Protecting Employees



What laws apply to the
business or organization?



What laws apply to the staff?

Federal Employee Protections

- **1+ employees**
 - Worker pay and work conditions - FLSA, NLRA, Equal Pay Act
 - Nursing Mom's Break
 - Benefits related – ERISA
 - Fair Credit Reporting Act
 - Immigration and Military/Veteran laws
 - Cannot be terminated for bankruptcy
 - Garnishment rights
 - No polygraphs

Federal Employee Protections

- 15+ employees
 - Americans with Disabilities Act (ADA)
 - If 20+ Age Discrimination in Employment Act (ADEA) and COBRA
 - Genetic Information Non-Discrimination Act (GINA)
 - Title VII of the Civil Rights Act
 - Pregnant Workers Fairness Act
 - Race, sex, national origin, color
 - Sex includes gender identity and sexual orientation

Federal Employee Protections

- **50+ employees**
 - Affordable Care Act (ACA)
 - Family and Medical Leave Act (FMLA)
- **100+ employees**
 - Worker Adjustment and Retraining Notification (WARN) Act

Arizona Employee Protections

- Arizona Civil Rights Act for 15+ employees
 - Sexual harassment applies to ALL employers
- Wage and Hour laws
- Unemployment Insurance
- Arizona Employment Protection Act
- Fair Wages and Healthy Families Act (minimum wage/EPST)
- Workers' Compensation – you must have!
- Occupational Safety and Health
- Mini-COBRA
- Drug Testing of Employees Act - optional
- Legal Arizona Workers Act – E-Verify
- Child Support Enforcement
- No discrimination if garnished
- Blacklisting and early statehood laws

Employee Protections

- Respondeat superior - an employer may be held vicariously liable under the doctrine of respondeat superior for the negligent acts of its employee acting within the course and scope of employment.
- For an employer to be held vicariously liable for an employee's negligent acts, the employee must be:
 - (1) subject to the employer's control or right of control, and;
 - (2) acting in furtherance of the employer's business.

Independent Contractors

- No protection from federal and state law
- Hiring entities have no obligations related to:
 - Tax withholding
 - Insurance coverage
 - Minimum wage and overtime payment
 - Worker injuries
 - Employee benefits, retirement plans
 - Concerted activity or collective bargaining
 - Responsibility for misdeeds of contractors

WARNING: You can be sued by an independent contractor.

Attraction of IC's

- Less cost
- Fewer reporting requirements
- Fewer restrictions related to how workers are treated
- No government oversight

*The contract defines the relationship –
but you **NEED A WRITTEN CONTRACT!***

Fact or Fiction?



Lawyers can engage independent contractors in their practices with no concerns.

ER 5.1

Responsibilities of Lawyers Who Have Ownership Interests or are Managers or Supervisors

(a) A lawyer who has an ownership interest in a firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a firm, shall make reasonable efforts to ensure that the firm has in effect internal policies and procedures giving reasonable assurance that all lawyers and nonlawyers in the firm conform to these Rules of Professional Conduct.

(1) Internal policies and procedures include, but are not limited to, those designed to detect and resolve conflicts of interest, maintaining confidentiality, identifying dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

(2) Other measures may be required depending on the firm's structure and the nature of its practice.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person who is being supervised and the amount of work supervised. Whether a lawyer has supervisory authority may vary given the circumstances.

(c) A lawyer shall be personally responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer has an ownership interest in or has comparable managerial authority in the firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(i) Appropriate remedial action by an owner or managing lawyer depends on the immediacy of that lawyer's involvement and the seriousness of the misconduct.

(ii) A supervisor must intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

ER 5.3

Responsibilities Regarding Nonlawyers

(a) A lawyer in a firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of nonlawyers engaged in activities assisting lawyers in providing legal services and those who have access to attorney-client information, is compatible with the professional obligations of the lawyer. Reasonable measures include, but are not limited to, adopting and enforcing policies and procedures designed:

(1) to prevent nonlawyers in a firm from directing, controlling, or materially limiting the lawyer's independent professional judgment on behalf of clients or materially influencing which clients a lawyer does or does not represent; and

(2) to ensure that nonlawyers assisting in the delivery of legal services or working under the supervision of a lawyer comport themselves in accordance with the lawyer's ethical obligations, including, but not limited to, avoiding conflicts of interest and maintaining the confidentiality of all lawyer client information protected by [ER 1.6](#).

(b) A lawyer having supervisory authority over a nonlawyer within or outside a firm shall make reasonable efforts to ensure that the nonlawyer's conduct when engaged in activities assisting lawyers in providing legal services is compatible with the professional obligations of the lawyer.

(1) Reasonable efforts include providing to nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment or retention, particularly regarding the obligation not to disclose information relating to the representation of the client.

(2) Measures employed in supervising nonlawyers should take into account that they may not have legal training and are not subject to professional discipline.

(3) When retaining or directing a nonlawyer outside the firm to assist the lawyer's delivery of legal services, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(4) Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.

(c) A lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer has managerial authority in the firm and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) When a firm includes nonlawyers who have an economic interest or managerial authority in the firm, any lawyer practicing therein shall ensure that a lawyer has been identified as responsible for establishing policies and procedures within the firm to assure nonlawyer compliance with these rules.

Does the level of supervision I am required to provide allow for me to hire contractors?



How to Decide?

- **BALANCING TESTS - Help guide your decision**
– **NOT definitive**
- If the worker is economically dependent on the employer, as opposed to being engaged in a business of the worker's own, the worker is more likely to be an employee
- The actual practice of the worker and hiring entity is more relevant than what is contractually or theoretically possible.

Economic Realities Test

- Totality of circumstances
- Is worker dependent on employer?
 1. Worker's services integral part of business?
 2. Permanency of relationship
 3. Amount of worker's investment
 4. Right to control
 5. Opportunities for profit and loss
 6. Level of worker's skill
- Used by US Department of Labor and Arizona Industrial Commission

Integration

- Worker performs work that is not in the normal scope of the company's business operations
- Worker's function is to support the work of the company, not to be another person providing the services that the company normally offers
- Worker's services do not significantly affect the company's success

Permanence

- Worker has a high degree of freedom to exit the relationship
- Worker is not restricted from interacting with competitors during the course of the parties' relationship (or after relationship ends)
- Even if the worker maintains lengthy working relationship with the company, the worker does so only on a “project-by-project” basis

Investment

- Worker makes personal investment to buy and maintain the necessary facilities, equipment and tools to do the job
- Worker has needed resources to perform similar work for other entities
- Worker does not rely on tools of the hiring entity

Control

- Worker has the right to accept, reject, or ignore any opportunity offered - worker controls if, when, where, how, and for whom worker will work
- Worker has freedom to work for competitors
- Worker is subject to minimal, if any, monitoring of activities or control over the details of the work

Financial Exposure

- Worker controls profit or loss based on own decisions:
 - select among different jobs with different fees
 - accept as many jobs as worker sees fit
 - negotiate with customers over pricing
 - invest in facilities, equipment, or helpers
 - control costs of necessary resources

Skill and Initiative

- Worker has advanced level of education and skills, perhaps licenses, to perform the work
- Worker takes initiative to complete the work
- Company does not provide training opportunities to worker

Right to Control Test (Common Law)

- Control over process; not just outcome
- Distinct occupation or business
- Need for supervision
- Level of skill
- Provision of tools, supplies, and place of work
- Duration of service
- Method of payment
- Regular business of employer
- Intent of the parties
- Is hiring entity in business?

IRS Control Test

Developed by IRS, used by AZ Dept of Revenue

- Focuses on facts about the relationship to illustrate:
 - Behavioral - if there is a right to direct or control how the worker performs the specific task for which worker is hired
 - Financial - if there is a right to direct or control how the business aspects of the worker's activities are conducted
 - Relationship - how the parties perceive their relationship

IRS Control Test

1. Instructions.
2. Training.
3. Integration.
4. Services rendered personally.
5. Hiring, supervising, and paying assistants.
6. Continuing relationship.
7. Set hours of work.
8. Full time required.
9. Doing work on employer's premises.
10. Order or sequence set.
11. Oral or written reports.
12. Payment by hour, week, or month.
13. Payment of business and/or traveling expenses.
14. Furnishing of tools and materials.
15. Significant investment.
16. Realization of profit or loss.
17. Working for more than one firm at a time.
18. Making service available to general public.
19. Right to discharge.
20. Right to terminate.

Contractor Agreement

- General provisions - services, fees, payment, termination rights and process to transition clients, indemnifications, default/remedies, restrictive covenants ONLY as to confidential information and solicitation of company's employees
- Representations regarding experience, professional education, licensing
- Requirement to inform of past complaints, disciplinary actions from licensing board – or any actions that occur during relationship
- Malpractice insurance requirements
- Have the presumptive language of A.R.S. §23-902D
- Per A.R.S. § 23-961(m) - Include Workers' Comp Waiver
- Per A.R.S. § 23-1601 – Include Declaration of Independent Business Status

Arizona Law – Workers' Comp

ARS 23-902D gives PRESUMPTION if:

- Written, signed, dated, no duress agreement
- No authority to supervise or control
- Disclosure that no worker comp benefits
- No requirement of exclusive work; no combination of business operations
- No provision of required licenses
- Fixed amount by contract; not wage/salary – paid to name on contract
- Termination restrictions
- No tools or time of performance dictated

Declaration of Independent Business Status

ARS 23-1601 gives PRESUMPTION if:

- Contractor acknowledges that Contractor operates Contractor's own independent business and is providing services for or in connection with the Company as an Independent Contractor.
- Contractor acknowledges that Contractor is not an employee of the Company and the services rendered for or in connection with the Company do not establish any right to unemployment benefits or any other right arising from an employment relationship.
- Contractor is responsible for all tax liability associated with payments received from or through the Company and the Company will not withhold any taxes from payments to the Contractor.
- The Contractor is responsible for obtaining and maintaining any required registration, licenses or other authorization necessary for the services rendered by the Contractor.

Declaration of Independent Business Status

Contractor acknowledges at least six of the following:

- Contractor is not insured under the company's health insurance coverage or worker compensation insurance coverage.
- That the Company does not restrict the Contractor's ability to perform services for or through other parties and the Contractor is authorized to accept work from and perform work for other businesses and individuals besides the Company.
- That the Contractor has the right to accept or decline requests for services by or through the Company.
- That the Company expects that the Contractor provides services for other parties.
- That the Contractor is not economically dependent on the services performed for or in connection with the Company.
- That the Company does not dictate the performance, methods, or process the Contractor uses to perform services.
- That the Company has the right to impose quality standards or a deadline for completion of services performed, or both, but the Contractor is authorized to determine the days worked and the time periods of work.
- That the Contractor will be paid by or through the Company based on the work the Contractor is contracted to perform and that the Company is not providing the Contractor with a regular salary or any minimum, regular payment.
- That the Contractor is responsible for providing and maintaining all tools and equipment required to perform the services performed.
- That the Contractor is responsible for all expenses incurred by the Contractor in performing the services.

Contractor acknowledges that the terms set forth in this Declaration apply to Contractor, Contractor's employees and Contractor's Independent Contractors.

Liability for Misclassification

- Each situation is unique, fact-specific
- But - No “safe harbor” for unintentional misclassification.
 - Govt. presumes all workers are employees
 - Worker’s comp no insurance claims can ruin the business
 - In a dispute, burden will fall on business owner to show that a contracting relationship was proper
- Business owner personally liable for:
 - Employee benefits
 - Back wages and overtime pay
 - Tax and insurance obligations
 - Penalties, Interest, Attorney fees

Protect your Firm re: Contractors

- Review relationships to ensure the balance clearly tips toward contractor, not employee
 - It's always OK, legally, to hire an employee
- Carefully consider entering into long-term relationship
- Make sure contractor work requires high degree of skill, education, licensure
- Encourage contractor to find additional clients
- Allow contractor to accept whichever clients contractor chooses

Protect your Firm re: Contractors (2)

- Have written agreement, complying with ARS 23-902D and ARS 23-1601, stressing the independent nature of the relationship
 - With this, you will have a “rebuttable presumption” that worker is a contractor
- Professional liability insurance paid by contractor
- Proof that contractor has workers’ comp insurance on contractor’s “employees” or “helpers”
- Workers’ Comp waiver
- CLE credits paid by contractor
- Contractor responsible for license renewal and compliance
- Allow contractor to control how, when, where contractor works

Protect your Firm re: Employees

Comprehensive Employee Handbook including, but not limited to:

- CLIENT CONFIDENTIALITY
- Employment At Will
- Reporting/Prevention of Sexual Harassment
- Paid Time Off (Including Vacation, EPST, Personal, Breaks, Holidays and Bereavement)
- IOLTA Accounts and Handling Money
- Social Media and Technology policies
- Description of misconduct for Unemployment Compensation purposes
- Outside employment

Address Problems Immediately

- Safety Issues
- Significant Decrease in Productivity
- Increase in Healthcare Expenses
- Absenteeism
- Poor Decision Making
- Low Morale
- Increased Unwanted Turnover
- Possible Media Exposure

Ongoing Vigilance

- State and federal laws governing the relationship between workers and business owners are continually changing or being reinterpreted
- Stay up-to-date and review your policies and documents on a regular basis

Resources

- www.dol.gov/agencies/whd
- www.eeoc.gov
- www.nlr.gov
- www.osha.gov
- www.azica.gov
- www.azbar.org
- www.azlaborlaw.com
- www.wendyandersonlaw.com



Questions?

DENISE M. BLOMMEL

Denise M. Blommel, PLLC

denise@azlaborlaw.com

www.azlaborlaw.com

WENDY M. ANDERSON

Law Office of Wendy Anderson, PLLC

wendy@wendyandersonlaw.com

www.WendyAndersonLaw.com