Specific Criteria for Texas Independent Contractors

Employers often confront these issues over short-term or as needed workers performing services for them. Any employer using what it considers to be "contract labor" should ask itself some questions up front:

**Is the service provided by the individuals in question essential to, and an integral part of, the service the employer provides to the public?** The less able an employer is to offer its primary service without the help of the people whose status is at issue, the more likely it is that they will be considered employees. Consider this: if certain services are so essential to a business that it will stand or fall based upon how well those services are performed, the business will naturally want to exercise enough direction and control over the services to ensure they are good. That amount of control can make a company an employer of such workers.

**What opportunity for profit or risk of loss is there for the worker? What kind of investment, other than his or her time, does the worker have in the enterprise?** An employee is paid for her time. She would not be expected to provide her own workplace, materials, tools, and supplies, or otherwise to invest her own money in the business. An employee who makes a costly mistake can be fired, but cannot legally be forced to work without pay. An independent contractor, on the other hand, is an independent businessperson with expenses of his or her own. He will be expected to provide or purchase everything he needs to do the job. If he fails to satisfy the customer, he would be required to redo the work for no additional compensation, or else face the risk of non-payment by the customer. These things create the opportunity for profit or loss.

**What is the compensation arrangement? Is the compensation negotiated, or is it imposed by the employer?** A true independent contractor's main concern is her own bottom line, not that of the employer. Since she is responsible for her own overhead, including the hiring of any helpers she may need, there is always an element of negotiation in any bona fide contract for services. Usually, but not always, an independent contractor is paid by the job. It is up to him to figure out how much he needs to finish the job at a profit. If he miscalculates, the loss is his.

**Does the individual provide his services to the public at large? Does he advertise his services in newspapers, the Yellow Pages, or specialized journals?** If a person holds herself out to the public as self-employed and available for work for any customer with whom she can negotiate an acceptable price, she is likely to be held an independent contractor. The more the worker advertises, the more it is apparent that she is in business for herself, since an independent business stands or falls based upon its business development efforts.

**Is there a non-competition agreement?** Generally, non-competition agreements and independent contractors do not go hand-in-hand. Such a provision in a contract is strongly indicative of an employment relationship, chiefly because it proves that the services in question are directly related to the primary service provided by the employer. If those services were not related, there would be no "competition" and thus nothing against which to guard. The power to keep a person from pursuing his or her own business interests and to force a person to sign such an agreement is typical of the power wielded by employers over employees.

**Does the worker provide his services on a continuous basis?** The more long-term, continuous, and exclusive the relationship is, the more likely it is to be employment. Independent contractors, on the other hand, generally perform their work one job at a time and are paid on the same basis.

**Is the worker required to provide services under the employer's name? Does she represent herself to the public as being an employee of the employer? On whose behalf are the services performed?** If the general public would perceive the person to be a representative of the employer because of business cards, uniforms, or other advertising, this would be more indicative of an employee than an independent contractor. An employee performs services on behalf of the employer for customers of the employer. An independent contractor performs services on her own behalf for her own customers.

**Does the employer retain the right to dictate how the work should be done? Is the worker required to work a certain schedule, to notify the employer if he will not come to work, or to get the employer's approval for any helpers who are hired?** When an employer contracts for outside services, it is normally interested only in the end result, not in the details of how the contractor performs the work. The employer should have no interest in how the independent contractor allocates either his time or that of his helpers. By the same token, the employer would have no interest in the contractor's right to hire his own helpers, beyond the right to contractually specify that anyone providing services on a project must be properly licensed under whatever laws apply to the work.