

By Michael L. Antoline, J.D.

## Roofer or Receptionist?

Employee or IC? Misclassify your workers  
and everyone pays the price.

THE CONCEPT IS SIMPLE. A DEBTOR OWES YOU money. If that debtor has a stream of income, a paycheck for example, you have the debtor's employer reserve part of the debtor's salary and send it directly to you—one way this concept is used is in wage garnishment. But there's another, far more widespread, use of the concept. It's put into action in income tax withholding. The employee owes the government taxes. The government requires the employer to withhold a percentage of those taxes and deposit it directly with the United States Treasury. I can tell you that if you take all the wage garnishments ever

processed they would pale in comparison to only about a week's worth of government withholding. When you're talking withholding, you're talking about big, big money. The government *adores* withholding and it *abhors* anything that interferes with it.

What's the major impediment to the government's steady stream of tax income? Think about your situation as a spa owner. From what kind of worker's paycheck are you, the employer, not required to withhold taxes? The answer is the paycheck of the independent contractor (IC). Let's be frank: The government doesn't like for workers to be ICs. If it had its druthers, everybody would be an employee. So the government has an incentive to question whether or not a worker is in reality an IC.

### Conflicting Agendas

Despite recent trends toward salaried employees in spas, many spa/salon owners, as well as many small-business owners in general, continue to prefer ICs to employees. Why? First, as mentioned above, there's no tax withholding requirement; consequently there's also no record-keeping requirement. Second, many federal and state regulations apply to a business enterprise only after a threshold for a minimum number of employees is met. Using ICs keeps that number low. Third, and most important, using ICs saves employers money because they don't incur the costs of unemployment and Social Security taxes with these people. The employer also saves on workers' compensation insurance premiums by keeping insurance on a lesser number of employees. Another economic



## You Know They're Probably Employees When ...

The IRS has established 20 factors to determine whether a worker is considered an employee or an independent contractor (IC), called the Common Law Factors. According to the IRS, factors pointing to employee status include:

1. You, as the employer, tell the worker when, where and how to do his or her work.
2. You train your employees and/or require them to attend seminars or training sessions, or you have other employees work with them for a period of time to "break them in."
3. The importance of the worker's services to the business is a factor, so if the business depends heavily on the worker providing the services he or she does, a certain level of control will be assumed and this weighs toward finding the worker as an employee.
4. The services are personal in nature and, therefore, are assumed essential to the business.
5. You hire, supervise and pay the worker, showing a level of control associated with an employer/employee relationship.
6. The length of relationship and the consistency of the tasks performed implies that the person is an employee, as when a nail technician appears at your spa every day and performs the same job.
7. The worker is required to submit reports, track hours or record the number of customers served. This speaks to control.
8. The employer schedules the worker's hours.
9. The worker provides services on a full-time basis primarily to one employer.
10. The work is performed on the employer's premises, implying an increased degree of control.
11. The worker's tasks are generally done in a repeatable sequence or pattern.
12. The worker is paid on an hourly basis or periodically. (Pay by commission only or piecework points to IC status.)
13. The employer purchases materials and supplies for the worker or pays other business-associated expenses. This speaks to control.
14. The employer furnishes workspace, tools, workstations, lighting or other equipment.
15. The worker doesn't significantly invest in tools, equipment or facilities; therefore, the employer must do so.
16. The worker performs the same services for only one or just a few employers.
17. The worker doesn't risk his or her own assets, chancing a profit or a loss. Rather, the employer provides workspace, tools, equipment and a client base, minimizing the chance of loss.
18. The worker doesn't advertise or make known to the general public his or her services.
19. The employer can fire the worker without breaching a contract.
20. The worker can terminate his or her relationship with the employer without breaching a contract.

incentive: The tasks performed by ICs are at a fixed rate no matter how long they take.

We've established that spa owners have an incentive to treat workers as ICs, and the government has an incentive to classify workers as employees. These opposing incentives lead to conflict. How common are these kinds of conflicts? Very.

tion is to be shielded from personal liability, but there are exceptions to this protection. *Officers of a corporation can be held personally liable for failure to pay withholding taxes.*

If you offer a retirement or other benefit plan, it usually includes a requirement that all employees be treated equally. If the government determines that you wrongly excluded workers from

## If the government determines that you wrongly excluded improperly classified workers from your benefit plans, your entire plan could be voided.

The downside for an employer who loses the conflict can be steep. The government can require him or her to pay back payroll taxes plus penalties and interest. This is one situation wherein the protection given by a corporate structure doesn't work. One of the main reasons to form a corpora-

your benefit plans because they were—improperly—classified as ICs, your entire plan could be voided. If an IC is improperly classified as such and paid on a flat rate, it may be found that the employer has violated the minimum wage provisions, and possibly other wage and hour laws.

## The more IRS determination factors that apply, the more clearly a person is likely to be considered an employee.

There may be some criminal penalties as well.

### Status Seeking

How can you, as an employer, deter-

mine whether one of your workers is an IC or an employee? Way back in 1987, the Internal Revenue Service came up with a list of 20 factors (see “You Know They’re

Probably Employees When ... ,” page 38) to make this determination. However, keep in mind that the IRS still has to answer to the courts and, on several occasions, courts have modified or added to the criteria. The factors aren’t an all-or-none proposition. In other words, *merely having one factor apply doesn’t conclusively establish a person as an employee*. It’s a weighing test: The more factors that apply, the more clearly a person is likely to be considered an employee.

The factors aren’t only numerous, they’re somewhat complex in their application. It helps to think about them conceptually. First, go through the factor list and think about a guy you might hire to put a new roof on your home. He goes from house to house and job to job. He has his own tools. You tell him you want the roof done and maybe make your own material and color choices, and he does the job without supervision. He’s clearly an IC. Second, consider the receptionist at your spa, whom you hired as an employee, and the criteria. Then, go through the rest of the current workers in your spa that you now pay as ICs. Do they have more of a roofer or receptionist flavor?

Still not sure? If you want the IRS’s help in determining whether a worker should be classified as an IC or employee, you can fill out IRS Form SS-8. Even if you aren’t enthused about letting the IRS decide, the form is valuable for employers because it lists the factors the IRS considers important. The form can be downloaded in .pdf format at [irs.gov/pub/irs/fss8.pdf](https://irs.gov/pub/irs/fss8.pdf). ●

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