

ELP Risk Management 360:

Smart Hiring, Compliance, and Litigation Readiness

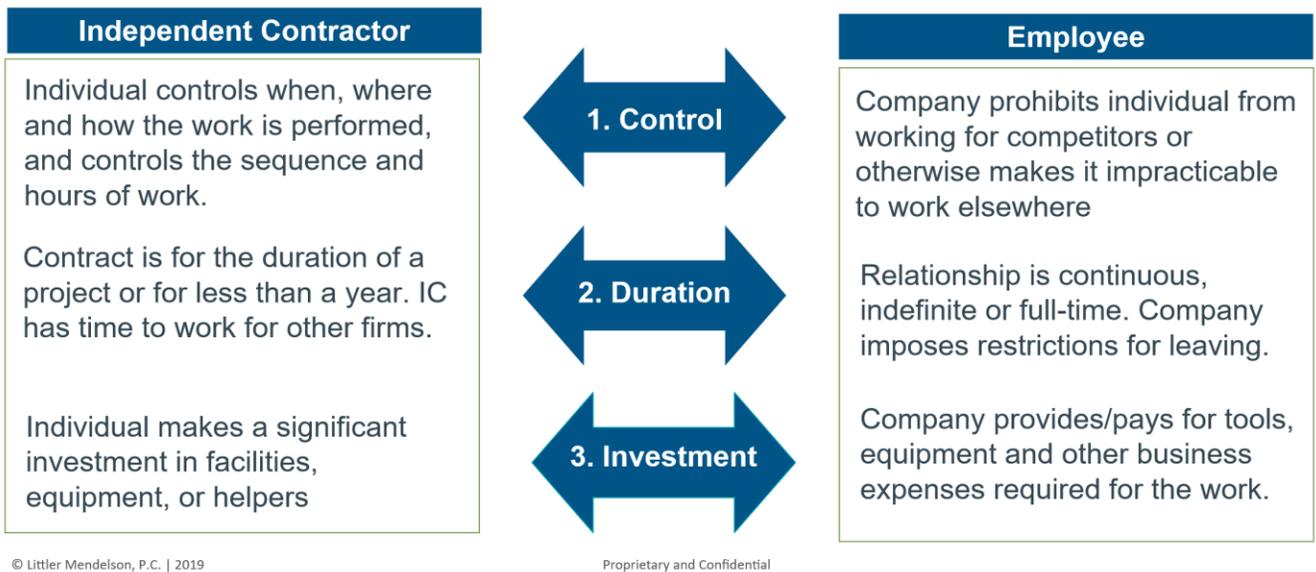
- **Best Practices of Employment**
 - Position Description and Job Postings
 - Is the job description up to date?
 - Is the position properly classified as exempt or non-exempt?
 - Is the job posting done publicly?
 - If so, does it share the relevant pay band?
 - Onboarding Logistics – typically we use a checklist – **See attached Checklist**
 - I-9 Compliance
 - Relevant Tax forms
 - Minimum wage analysis
 - Proper classification (employee v. independent contractor – more on this in a bit)
 - **Relevant Policies and Employee Handbook**
 - **Arbitration Agreement**
 - Benefits of the same RE privacy of matters
 - Relevant requirements vary state-to-state, but we can advise on the same
- **Misclassification: 1099 – Is the individual an “Independent Contractor” or an “Employee”**
 - Common Law Control Test: This test focuses on whether the company has the right to control not only the result of the work but also the means and methods by which the work is performed. The Internal Revenue Service (IRS) uses this test, informed by its 20-factor analysis, to determine whether a worker is an employee under federal tax law. The more control the company exercises over how the work is done, the more likely the worker is an employee.
 - Economic Realities Test: This test examines whether the worker is economically dependent on the company or is truly in business for themselves. It looks at the “economic realities” of the relationship — for example, whether the worker provides services to multiple clients, invests in their own tools and equipment, and bears the risk of profit or loss.
 - ABC Test: Under this test, a worker is considered an independent contractor only if all three conditions are met: 1) The worker is free from control and direction, both under the contract and in fact; 2) The work is performed outside the usual course of the hiring entity’s business or outside its places of business; and 3) The worker is

customarily engaged in an independently established trade, occupation, or business. This test is generally viewed as more restrictive, making it harder to classify a worker as an independent contractor.

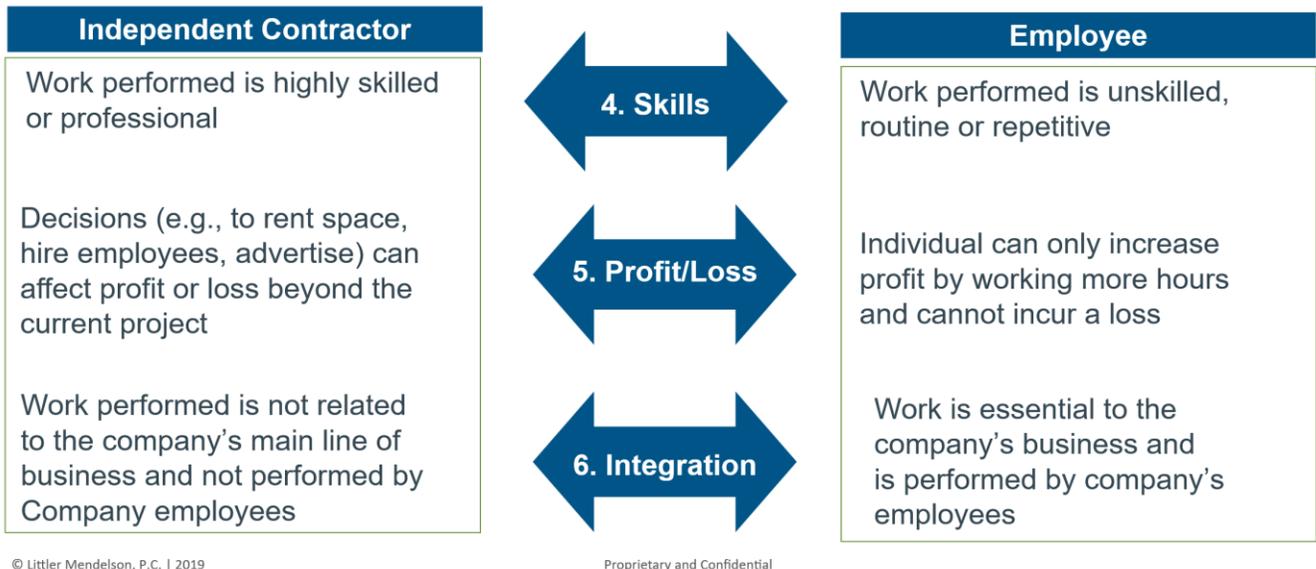
- **Statutory Classifications for Federal Tax Purposes:** The Internal Revenue Code also defines certain “statutory employees” and “statutory independent contractors.” For example, under 26 U.S.C. § 3508(b)(1), a real estate agent is a statutory independent contractor if: 1) the individual is a licensed real estate agent working as a salesperson; 2) substantially all remuneration is based on sales or output rather than hours worked; and 3) the services are performed under a written contract stating that the individual will not be treated as an employee for federal tax purposes.
- **Indicators of an Independent Contractor Relationship:** An independent contractor typically has autonomy to organize and carry out work according to their own methods, sets their own schedule, uses their own tools and resources, manages their own expenses, and may work for multiple clients simultaneously. The lack of subordination — meaning the worker is not under the control or direction of the Company — is a fundamental characteristic of an independent contractor relationship. In practice, proper classification requires evaluating all relevant facts under the applicable test.
- **Red Flags:**
 - IC is a former employee;
 - IC performs same work as employees;
 - IC agreement includes a non-compete provision;
 - IC is paid by the hour and not by the project;
 - Company provides training;
 - Company controls hours worked;
 - Company provides tools or equipment; and
 - Company reimburses IC for business expenses.
- **Why Does it Matter:**
 - Misclassification can lead to significant tax, wage, and benefit liabilities, so it is important to document the relationship carefully and ensure that the facts align with the claimed classification.
 - Critical benefits and protections depend on employment status:
 - Workers compensation;
 - Unemployment;
 - Wage and hour concerns under the FLSA and State labor Codes (e.g., meal and rest breaks, business expenses, overtime, etc.);
 - Taxes;

- EEOC claims;
- Benefits (ACA, 401(k), stock plans, pension plans, etc.)
- In Practice:

Evaluating IC Status



Evaluating IC Status



- Handling a Lawsuit from Cradle to the Grave Specific to EPL
 - Receipt of a claim, grievance of complaint from employee
 - Reach out to your EPLI carrier and attorney
 - We are happy to assist
 - Investigate claims at issue
 - Working with attorney may allow for the investigation itself to be privileged
 - Deadlines
 - Responding to a complaint for damages
 - Determining the best course of action
 - Individualized based on circumstances and personnel involved
 - Discovery
 - Written discovery
 - Depositions
 - Seeking to have suit dismissed
 - Mediation
 - Trial
- Litigation v. Arbitration
 - Benefits of both
 - Costs
 - Privacy
 - Using arbitration agreement as both a carrot and a stick vis-à-vis early settlement discussions
- Termination/Offboarding – Checklist
 - Timing of final wages – dependent on state law;
 - Severance or Release agreement – discuss benefits of the same;
 - Notice RE COBRA;
 - Notice RE Unemployment; and
 - Plans or Pensions.