

Categories

What you need to know before you classify your workers.

BY JUSTIN JETER AND MICHAEL MELDER

The classification of workers as employees or independent contractors is critically important to businesses. This decision impacts everything from tort liability to tax withholding to minimum wage and overtime. Correct classification is critically important, but how do businesses categorize their workers?

Many businesses rely on an *ipse dixit* approach to classification. *Ipse dixit* (a great Latin term to regale colleagues with), translates to “he himself said it.” In legal circles, it means an unsupported statement that rests solely on the authority of the person saying it. Webster’s further defines it as “an assertion made but not proved.”

Can you see how this plays out? The IRS begins investigating your business for worker classification issues with potentially expensive outcomes. The investigator asks, “Why are these workers independent contractors?” Mustering the appropriate gravitas, you respond, “It is my arbitrary dogmatic statement that I expect you to accept as valid.” Do you think the investigator closes his file and declares that answer as good enough?

Unfortunately, your proclamation that a worker is an independent contractor is not binding on the bodies concerned with classifications, including the courts, the IRS, and the Department of Labor. Similarly, they do not care that the employee wanted to be an independent contractor, or that you and the worker agreed in

writing to independent contractor status. It is not a question of proclamation or agreement. So what is it?

It is a question of control, and it is decided on a case-by-case basis. The IRS, for example, advises businesses that “all information that provides evidence of the degree of control and independence must be considered.” This information may be:

- Behavioral—does the business control or have the right to control the details of the worker’s work?
- Financial—does the business control the financial aspects of the worker’s job?
- Type of relationship—does the business provide the worker with employee-type benefits?

It is impossible to provide a bright-line rule for all classification issues, but we recommend a mental exercise to businesses questioning classifications. Think about the trades. As long as you are not running a plumbing business, a plumber is the classic example of an independent contractor. When we hire plumbers, they come to where we want the work done; they drive their own truck; they bring their own tools; and they pay their own expenses. Importantly, they also do the work using their own experience. We do not tell them how to do their job. The plumbers’ work has no bearing on the work of our businesses. Once plumbers

are done, we pay them and they move on to the next job.

Now, with that in mind, take a look at your current workforce. Do your “independent contractors” look like plumbers? Or, do they look like employees? They may be employees if:

- They have been working for you for an extended period of time;
- They work in the same building as your business;
- You provide them with direction in the means and manner of their job;
- You pay them like your employees; or
- They work only for you.

If you answered yes to any of these questions, your contractors might be employees.

The Texas Workforce Commission, the IRS, the Department of Labor, and Texas courts use multi-factor tests to determine whether an independent contractor is truly an employee. So, if you are relying on a 1099 to justify calling someone a contractor, you might have some issues. You may need to reclassify them as employees. **TBJ**



JUSTIN JETER

is a partner in the business and innovation law firm Chester & Jeter in Dallas. He can be reached at jeter@chester-law.com.



MICHAEL MELDER

is of counsel to Chester & Jeter in Dallas. He can be reached at melder@chester-law.com.

The content included in this column is for educational and informational purposes only. Please consult an attorney regarding specific legal questions.