

## TSP 2014

### Sub-Contractor or Employee?

### Employee or *Independent Contractor*

- Key Points in determining whether an employment relationship exists
  - The extent to which the work performed is an integral part of the employer's business.
  - Whether the worker's managerial skills affect his or her opportunity for profit and loss
  - The relative investments in facilities and equipment by the worker and the employer
  - The worker's skill and initiative
  - The permanency of the worker's relationship with the employer
  - The nature and degree of control by the employer

When determining whether you can safely treat a worker as an independent contractor, there are two separate tests you should consider:

### The Common Law Test

- This is used by the IRS and commonly referred to the 20-factor common law test and is used to measure how much control you have over the worker. These factors are reflected on IRS Form SS-8.
- According to the manual the IRS used to train its worker classification auditors, the three most important factors are:

## Instructions to Workers

- Your worker is probably an employee if you require him or her to follow instructions on when, where, and how work is to be done. This is a very important factor.

## Job Training

- If your company provides or arranges for training of any kind for the worker, this is a sign you expect work to be performed in a certain way; therefore, the worker is your employee. Training can be as informal as requiring the worker to attend meetings or work along with someone who's more experienced.

## Worker's ability to make a profit or suffer a loss

- An employee may be rewarded, disciplined, demoted, or fired depending on job performance, but only an independent contractor can realize a profit or incur a financial loss from his or her work. In other words, an employee will always get paid; an independent contractor, however has a financial stake in his enterprise.

## The Reasonable Basis Test

- This test is based on how the courts and the IRS have classified similar workers in your company or your industry in the past. To establish a contractor relationship, it may be important to have each contractor fill out an "Independent Contractor Agreement" (see handout)

## Misclassification of Employees

- If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you are liable for employment taxes for that worker.

## Example

- Milton Manning, an experienced tile setter, orally agreed with a corporation to perform full-time services at construction sites. He uses his own tools and performs services in the order designated by the corporation and according to its specifications. The corporation supplies all materials, makes frequent inspections of his work, pays him on a piecework basis, and carries workers' compensation insurance on him. He does not have a place of business or hold himself out to perform similar services for others. Either party can end the services at any time.

- Employee or Independent Contractor?

Milton Manning  
**is an employee**  
of the corporation.

Each state can or does have its own laws

- Texas Worker's Compensation Law for residential and small commercial construction contractors states:

Independent Contractor means a person who contracts to perform work or provide a service for the benefit of another and who:

- Is paid by the job, not by the hour or some other time-measured basis
- Is free to hire as many helpers as he desires and to determine what each helper will be paid
- Is free to work for other contractors, or to send helpers to work for other contractors, while under contract to the hiring employer.

- This is not meant to be all inclusive and we recommend that you contact a local "labor law" lawyer before hiring a sub-contractor.

You are only as good as your sub-contractor

### Qualified labor means qualified sub-contractors

- Although you cannot demand that your subs get training or become certified tile installers, you can give them “access” to training by informing them of different training opportunities in your area. “Quality” subs will take advantage of this.
- Although you cannot tell your sub-contractors how or when to work, you can hold them to the same contractual requirements that you are being held to by your general contractor.
  - Many contracts have times that work is expected to be done
  - Most contracts and/or project specifications are held to ANSI and or TCNA installation requirements
  - Require your sub to carry the same insurance as you are required to carry.

### Sub vs Employee

- Subs are only concerned about laying a bunch of tile and to make as much money as possible and not concerned about quality
  - Require your subs to fix their poor quality work. Hold a retainer on them so you have money on hand if they refuse to do the corrective work

- You have no control over the character of the subs employees.
  - Although you cannot hire or fire a subs employees, you can demand that the sub meets the proper decorum, dress and on some projects, legal background that is required for the particular job that is being done and that would include all of his employees.

- Cost Control
  - It is easier to control job cost with subs. Although there is greater potential to make more money with an employee the propensity to lose money is greater as well.
    - Know what the job costs are going into the project
    - No punch list or repair cost
    - No vehicle payment, fuel, maintenance, paying for down time.
    - Down time between projects

- Know what you are doing

- You and someone else within your company needs to know proper procedures for installing ceramic tile.
- Only half of an installation is what it looks like. In the end, it's what you can't see that could be a potential problem. As long term quality is demanded of you, you must demand it of your subs and employees.

- Low price is not always the best guarantee for future projects.

- Quality work and finishing a job ahead of schedule will improve long term income and additional projects.
- Reduce overhead to lower costs.

- We are in a rapidly changing industry
- Subs are going into business for themselves prior to knowing what they are doing