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### Helpful Links

CA Employment  
Development  
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Nevada Department of  
Employment, Training  
and Rehabilitation

[https://uitax.nvdetr.org/  
crphtml/ui\\_information.  
htm#Independent\\_Con  
tractor\\_Criteria](https://uitax.nvdetr.org/crphtml/ui_information.htm#Independent_Contractor_Criteria)

## *New Increased Penalties*

Both the IRS and the states are looking to raise revenue while increasing compliance with certain laws during a time when people are making less money and owing less tax. What better way than to increase civil penalties, which are not based on tax due, to draconian levels. For a seemingly innocent omission or misinterpretation, penalties for a misstep in these two particular areas can run into the **tens of thousands of dollars**: 1) classifying workers as independent contractors, and 2) reporting foreign financial accounts or assets. We will discuss reporting requirements for foreign financial accounts in next month's newsletter.

## *Independent Contractors*

Beginning in 2012, California has increased the penalties against employers who willfully misclassify an individual as an independent contractor who should have been treated as an employee. Civil penalties under the new law begin at \$5,000 and can go as high as \$25,000 for each violation in addition to other fines and penalties permitted by law.

A law with penalties similar to California's made its way through Nevada's Senate and Assembly in 2011, but was vetoed by Governor Sandoval. However, failure to report and pay unemployment insurance on misclassified employees in Nevada may still result in late filing fees and interest, as well as a civil penalty of \$5,000 or 10% of the amount due.

Employment status is determined on a facts-and-circumstances basis, with certain factors weighing more heavily than others. These laws are meant to protect workers who may be entitled to the protections under the employment laws of the state and to collect employment taxes and unemployment insurance. Because the correct classification is not always clear-cut, the more conservative route is to classify a worker as an employee, when in doubt.

Under federal law, there are three deciding factors:

1. **Behavioral:** Does the company control or have the right to control what the worker does and how the worker does his or her job?
2. **Financial:** Are the business aspects of the worker's job controlled by the payer? (These include things like how the worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
3. **Type of Relationship:** Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

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### **How Can We Help?**

The laws regarding independent contractor status are voluminous and complex. The IRS and State of California are not taking these laws, or the associated penalties lightly, and neither should you. Please let us assist you if this issue may affect you or your business.

## **Independent Contractors - Continued**

Nevada Unemployment Compensation Law does not define "independent contractor." It uses what is commonly referred to as the "ABC" test. All three conditions must be met to classify as an independent contractor and the burden of proof rests upon the employer to demonstrate the existence of these conditions:

1. The person has been, and will continue to be, free from control or direction over the performance of the services, both under his contract of service and in fact; and
2. The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and
3. The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service.

The basic test under California law is whether the employer has the right to direct and control the manner and means by which the work is performed, whether or not they exercise that control. If the employer does not have the right of direction and control, then the worker is generally an independent contractor.

The following are questions you may ask to help determine if you, as the employer, have the right of control:

1. Do you instruct or supervise the person while he or she is working?
  - Independent contractors are free to do jobs in their own way, using specific methods they choose.
2. Can the worker quit or be fired at any time?
  - Independent contractors are engaged to do specific jobs and cannot be fired before the job is complete unless they violate the terms of the contract, nor are they free to quit before the job is complete.
3. Is the work being performed a regular part of your business?
  - Work that is a necessary part of the regular trade or business is normally done by employees.
4. Does the worker have a separately established business?
  - If the individual holds themselves out to the general public to perform services similar to those performed for you, it suggests they are operating a separate business and would be an independent contractor.
5. Is the worker free to make business decisions which affect his or her ability to profit from the work?
  - This includes decisions involving real economic risk aside from the risk of not getting paid, such as acquisition and use of equipment and facilities used in the individual's work.
6. Does the individual have a substantial investment which would subject him or her to a financial risk of loss?
  - Independent contractors furnish the tools, equipment and supplies needed to perform their work.

### **Questions?**

If you have any questions about this newsletter or any tax issue, please feel free to contact our office at (775) 882-3201. You can also find a copy of this newsletter as well as our other updates and notices at [www.fwcpas.com](http://www.fwcpas.com).