



When is someone a contractor or an employee?

Learn how to

Classify your Staff

Hiring somebody to help you with your child care business can be one of the best decisions you can make. It increases your ability to serve more children, improve program quality, and be a more efficient business. However, there's a question that often comes up - is my hire a contractor or an employee? The risks are real and knowing the answer can save you a great deal of time and money.

What's the Issue?

Employees and contractors are treated very differently under federal and state law. Contractors are considered independent business people. They pay their own employment taxes and the employer usually has fewer legal obligations for the worker. Employees, on the other hand, come with greater costs, like employment taxes and benefits.

Sometimes, in the face of these additional costs, child care business owners will opt to have a person be treated as a contractor, even though they should be an employee. Sometimes, this is even the preference of the worker as well. The problem is that the classification isn't solely up to the employer or worker. There are rules that determine how someone should be classified.

This is important because misclassification of a contractor can cost you a great deal of money and time. If you make a mistake, even an "honest one" where you just feel you didn't know, you can be liable for:

- 100 percent of the employer taxes you should've been contributing all along.
- A portion of the employee's contribution to payroll taxes. (Yes, you read that right: the employer has to pay a portion of the taxes they would never have paid in the first place.)
- Subject to criminal fines for thousands of dollars.
- The price of any missed benefits and other compensation such as paid time off that the worker didn't get as a contractor.

With risks like these you can see why it is important to ensure you chose the right path - which leads to the question: How do you know which to choose?

The Three Essential Elements

In determining if you have a contractor or employee you want to look at the three essential elements of the definition of employment: **service**, **wages**, and **direction and control**.

1. **Service (Type of Relationship)** – Does the person work on a contractual basis or on short-duration projects (like a contractor)? Does the person work for other businesses or just for you?
2. **Wages (Financial)** — How is the person paid? For example, is the person paid every week for a set number of hours (which indicates an employee), or are they paid at the completion of a job (like a contractor)?
3. **Direction (Behavioral)** — How much control do you have over the day-to-day work? For example, do you set the requirements around the hours of work, what equipment or tools need to be used, or the training needed? (If yes, then this person is likely an employee.)

In most states that's about all the guidance you get.

Luckily in Virginia, there is even more detail from the Virginia Employment Commission to help us decide. Check out this guidance from the state of Virginia [Employee or Independent Contractor? | Virginia Employment Commission](#).

So, What Do You Do?

We recommend child care business owners take three actions when it comes to classifying workers as contractors:

First and foremost, think through a position before you hire. Run through the [IRS identified 20 factors](#) that indicate if someone is a contractor or an employee before you make the mistake of mis-hiring and have the liabilities associated with it.

Second, if you think you may have one or more misclassified contractors, stop and do a full assessment by reviewing the 20 factors linked above. Seek help from a Human Resources or Legal professional on what to do for anyone who is misclassified.

Third, when in doubt seek counsel from a Human Resources or Legal professional. As you now know from the possible penalties, potential misclassification is a high-stakes bet and one you don't want to lose. This is one of those times that it's worth the money to invest in professional advice if you have questions or want to be sure how to proceed.