

Use of Independent Contractors May Not Work

Many businesses are looking at bypassing some of the challenges created by the Department of Labor's (DOL) Overtime Rule by moving to the use of [Independent Contractors](#). Some of these include, but are not limited to, golf professionals and assistants, tennis professionals and assistants, and even some maintenance positions.

The most important question an owner or operator must ask when considering this options is, "will this person work for my business or simply provide a service?" This sounds like an easy question to answer, but the DOL and IRS have added a new litmus test for these positions. It's called the "[economic realities test](#)".

- ***Is the work an integral part of the business?*** It's easy to mistake "important" for "integral." Having a golf instructor is important, but if business could be conducted even if this service was not offered, the answer then leans toward no. The DOL guidance says, "A true independent contractor's work is unlikely to be integral to the employer's business." This factor is in favor of "contractor."
- ***Does the worker's managerial skill affect his or her profit or loss?*** Examples of managerial skills include a worker's decision to hire others, purchase materials, advertise and manage time that will affect his or her opportunity for profit or loss beyond a current job. In this situation, the custodian is not using those skills. This one goes to "employee."
- ***How does the worker's investment compare to the employer's investment?*** The DOL guidance says if "the worker's investment is relatively minor, that suggests the worker and the employer are not on similar footings, and the worker may be economically dependent on the employer." In this situation, the golf professional has almost no investment. I would vote this one as "employee."
- ***Does the work require special skill and initiative?*** The guidance notes, "A worker's business skills, judgment and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent" or an employee. Teaching golf requires technical skills, not business skills. This one also goes to "employee," I believe.
- ***Is the relationship indefinite?*** An independent contractor typically works one project for an employer and does not necessarily work continuously or repeatedly for an employer. In this situation, the relationship appears to be ongoing with no definite end date. Another point goes to "employee."
- ***What is the nature and degree of the employer's control?*** The more control an employer has over the meaningful aspects of the work, the more an employee relationship is established. The golf professional is required to harvest balls on the range after teaching is completed. So, the last factor is also in favor of "employee."

It is unlikely the golf professional will be considered an independent contractor once these six factors are applied, but if the situation is working for both parties, who will complain? Maybe nobody. However, if the club is audited—and the golf professional is found to be an employee instead of an independent contractor—there can be far-reaching financial ramifications for the business. These include potentially many years of federal, state, and local income tax withholdings, as well as Social Security and Medicare, workers' compensation liability, unemployment insurance penalties, Fair Labor Standards Act obligations, pension and insurance benefits, wrongful termination lawsuits, and vicarious liability to the city for the worker's negligent actions.

Previous IRS guidelines primarily relied on the "control test," which analyzed level of control held by the business vs the contractor. Under the new analysis, each factor is examined and analyzed in relation to one another, and no single factor is determinative. Given the nature of the golf club business, use of independent contractors would have limited application. However, if used, the NGCOA recommends management review the six factors identified above and ensure the contractor is only asked to deliver special and intermittent services to your club.

NGCOA also encourages its members to review all existing independent contracts in place, perform your own analysis and take appropriate steps to ensure full compliance with this new [policy](#). Members may contact our office for additional information or assistance with any compliance questions.