I just got a call from a client today and it started off like this: “I saw on a reality show where a restaurant didn’t pay their staff for 3 months while they were struggling, so I figured it was ok.” (First a brief lecture: those reality shows ARE SCRIPTED and likely “exaggerating” the truth, and if you don’t know that by now, you need to. And second, just because XYZ company just did a thing, doesn’t make it any more legal/proper/ethical for you to follow suit using them as the example. No, just no.)

Which brings me to the topic at hand: Independent contractors vs employees. You have to pay them both, but should you treat them the same? No, and the reason is clear.

As a small business (no matter the entity: sole proprietor, LLC, or a sub-S corporation), it is really easy for a solo owner to hire people to support their business operations and call them independent contractors, especially when they are only working as needed or part time. No timesheets, no taxes, no hassles, right? Somehow they can justify it the same as someone would justify paying cash to a babysitter, gardener, or housekeeper; but that isn’t the way it should be. There are so many resources on the internet offering checklists of what makes a hired worker “a W-2 employee” or “a 1099 contractor.” I think the biggest myth remains that it must be ok to hire someone on 1099 if they aren’t working for you on a full time basis.

**So IC vs EE?** Here’s a quick way for a small business owner to figure out which one woks for you. Answer these questions and be honest!

Is the work they are doing regularly **meant to support you** and your operations? (admin, clerical, telemarketing, etc.?) Easy – they are your W-2 employees. You give them ALL the tools to do the job, even if they are remote. (Or rent their equipment from them.) Examples:

* **Photographer** hiring **a caddy** to handle equipment, lighting, and staging when they get hired at a large wedding or party
* **Bookkeeper** hiring **an admin** person to handle incoming calls, customer service, and data entry
* **IT Contractor** hiring **a part time student as a sales person** to grow their business.

Is the work they are doing for you **something you offer your clients** as services? In most all cases, this also means they are employees. Some examples of a typical sole proprietor or small corporation who offers their services to the public:

* **Photographer** hiring **another photographer** when they get double booked during business season
* **Bookkeeper** hiring **another bookkeeper** to help with the volume of clients they need to support
* **IT Contractor** hiring **other IT guys** to service their clients

In all three of these scenarios, these MUST be employees because they are providing your services to your clients. This is the biggest trap when hiring individual people who will ultimately become your competitor in 2-5 years when they too become successful at their own business. They can only be legit subcontractors if the person hired is: also incorporated, has their own entity offering the same services to the public, and has the proper licenses/insurances/tools/equipment, etc., **and** are permitted to compete with you in the public arena. And even if all these points are satisfactorily met, it is still better to maintain the control and keep them as employees.

So what about these scenarios?

* **Photographer** hiring an ***IT contractor*** to help them build a networked working space with a few desktops, and setting up virus protection and a cloud for their staff to use
* **Bookkeeper** hiring ***photographer*** to take professional headshots of the team
* **IT Contractor** hiring a ***bookkeeper*** to reconcile and close their books each month

These are all specialty, non-essential positions and are sometimes short-term (photographer or plumber), or very part-term but long term (i.e. bookkeeper). In all three of these scenarios, these MUST be employees \*IF\* the person hired is NOT incorporated, does not have an established and legitimate business (sole prop/LLC) of their own offering the exact same services to the public, and does not have the proper licenses/insurances, etc. This is often the case where someone says they freelance, but only work for one or two companies part time. However, if they do have all these protections in place, then they can most likely be an independent contractor.

Once you establish that someone might be a subcontractor or 1099 staff, you must treat them as such. They don’t fill out timesheets, they don’t get overtime or get paid on a routine basis (like payroll), and you don’t exercise control over their job. You tell them what to do (end result) and when it is due (to be completed), but not HOW to do the job (step 1, step 2, step 3…) and WHEN to do the job (i.e. come to my office between 8 – 5, M – F). Very importantly, you also do not provide them with any tools to do their job… no business cards, no phone, laptop, etc., no desk/office/workspace, no hand tools, no mileage allowance, no software. Why? Because any legitimate 1099/contractor already in business, will have and use their own preferred electronics/communication devices, tools and specialty equipment to do their specialty job: expensive camera, car, cell phone, accounting software, licenses, plumbing supplies, etc.

It is very important to not create a huge undertaking to force someone who should be a W2 employee to be a 1099 contractor to skirt the rules. It just won’t stand up. Too many people have done it before you and have been caught. Granted, many more people have done it and gotten away with it for years, but why tempt fate? Even if both parties want to or agree to permit a mutual 1099 relationship without meeting these requirements, it doesn’t make it so. You cannot contract to break the law.

I leave you with the following: Use legit subcontractors if you need to. But when you need to take the leap and hire help, get excited for your company’s growth. When you hire your first staff member, even part time or “as needed,” then do it right the first time. Contact a professional who can get it done right in the fraction of the time it will take you to get it done halfway right. Once you lay out the important groundwork to take on your first employee, it’s easy to duplicate the rest.

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Tami is a semi-mythical HR enigma who both enforces rules for small companies yet is constantly trying to create ways around them. If there is a loophole, she will find it (and close it for you). In her personal life, she is obsessed with pairs and purple stuff. Want to know more? Visit her website and schedule a consultation.