

During the life of most small businesses, every owner might need help producing the deliverables and enlist persons outside their immediate family for help. Now the decision of how the helpers will be paid must be made.

This discussion pertains to your retail or wholesale loan originators, not your third party originators.

Should I pay this person as a 1099 contractor or W2 employee?

Should they be paid as an independent contractor or withhold taxes from their compensation as an employee? The biggest determining factors should not be what are easiest for the owner but rather what are correct in the eyes of the Internal Revenue Service. The "common law test".

In the past decade, the IRS has developed guidelines and common law rules to help small business owners make the right choice between independent contractor and employee. The decision should be well thought out and well documented in case of possible disputes later from either the helpers or the IRS.

The trend has been for the IRS to view all helpers under the direct control of a business owner as their employees not as contractors. This view allows for an easier method of tax collections direct from a single business owner rather than chasing down several independent contractors.

So, be careful with your choice, if the helpers you paid as 1099 contractors are determined later by the IRS as W2 employees then the Trust Fund recovery penalty which is federal income tax, social security and Medicare taxes not withheld will be assessed to the owner.

Below are excerpts direct from the irs.gov web site and might help you make the correct choice. As you consider these excerpts, think of them in combination with the Safe Act, Dodd Frank, the NMLS, and recent rulings classifying MLOs as "employees"

The general rule is that an individual is a 1099 contractor if you, the person for whom the services are performed, have the right to control or direct **only the result of the work** and not the means and methods of accomplishing the result. **THIS TEST CONFLICTS WITH HOW WE OPERATE OUR BROKER BUSINESSES. THE SAFE ACT, DODD FRANK, AND THE CFPB REQUIRE THE BROKER TO CONTROL THE MEANS AND METHODS.**

Example: Vera Elm, an electrician, submitted a job estimate to a housing complex for electrical work at \$16 per hour for 400 hours. She is to receive \$1,280 every 2 weeks for the next 10 weeks. This is not considered payment by the hour. Even if she works more or less than 400 hours to complete the work, Vera Elm will receive \$6,400. She also performs additional electrical installations under contracts with other companies that she obtained through advertisements. Vera is an independent contractor.

Common 1099 and W2 Rules

Facts that provide evidence of the degree of control and independence fall into three categories:

Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job? **OF COURSE WE DO. WE HAVE TO.**

Financial: Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.) **THE BROKER USUALLY PROVIDES BUSINESS CARDS, OFFICES, FORMS, ORIGINATION SYSTEMS, TRAINING, AND SOMETIMES LEADS.**

Type of Relationship: Are there **written EMPLOYMENT contracts** (REQUIRED BY REGS) 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?

Businesses must weigh all these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no "magic" or set number of factors that "makes" the worker an employee or an independent contractor, and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another.

The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

Finally, remember to ask a Certified Public Accountant or tax professional before making a final decision because as the owner the ultimate liability always falls directly on you.

You can read a longer article on this topic on the [IRS website](#).