

Tattoo Artists: Independent Contractors Or Employees?

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Most Tattoo Artists are known for their individual creativity, out-of-the-box thinking, and non-conformist mentality, all in a very positive way. In addition, many Tattoo Artists work either full time or part time tattooing their clientele out of one particular shop or a network of affiliated shops, without long-term commitments and the freedom to come and go without objection by the Tattoo Shop Owners. As a result of this freedom to work independently, many Tattoo Shop Owners pay their Tattoo Artists as independent contractors, instead of treating them as employees. However, both Tattoo Shop Owners and their respective Tattoo Artists should be mindful of some risks associated with classifying and paying the Tattoo Artists as independent contractors.

Generally, Tattoo Shop Owners, as a business, must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. The administrative and reporting requirements can be daunting for a Tattoo Shop Owner. However, by hiring Tattoo Artists as independent contractors, a Tattoo Shop Owner will not generally have to withhold or pay any taxes on payments to the Tattoo Artists, and the responsibility to report income and pay taxes falls squarely on the Tattoo Artists. Tattoo Artists as independent contractors receive a Form 1099 for services, and must report income on Schedule C and pay self-employment tax on the net profit. When Tattoo Shop Owners improperly classify their Tattoo Artists as independent contractors, the Internal Revenue Services loses out on revenue, and therefore, Tattoo Shop Owners may find themselves the target of an IRS audit, and could face significant consequences.

The determination of whether Tattoo Artists are properly classified as employees or independent contractors depends significantly on the particular facts and circumstances pertaining to each Tattoo Shop and its workers. Unfortunately, there is no clear, bright-line test to be used in making the determination. In determining a worker's status, the primary inquiry is whether the worker is an independent contractor or an employee under the "common law standard", which is derived from the judicial system in the United States through various court decisions over the years. Under the common

law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the “law of agency”, that is, whether one party, the principal, is legally responsible for the acts or omissions of another party, the agent, and depends on the principal’s right to direct and control the agent.

Over the years, courts have identified on a case-by-case basis various facts or factors that are relevant in determining whether an employer-employee relationship exists, and the IRS has promulgated a list of 20 factors, commonly referred to as the “Twenty Factor Test,” which can be found in Rev. Rul. 87-41. Using these 20 factors, the IRS generally has identified three (3) categories of evidence that may be relevant in determining whether the requisite control exists under the common law test:

1. **Behavioral control** – Which, for Tattoo Shops, would include such inquiries as whether the Tattoo Shop Owner controls, or has the right to control, what the Tattoo Artist does and how the Tattoo Artist does his or her job. For example, when to work, where to work, what tools or equipment to use, what routines or procedures must be used, and requiring use of specific tools, equipment and supplies;
2. **Financial control** – Are the business aspects of the Tattoo Artist’s job controlled by the Tattoo Shop Owner? Such as, how is the worker paid, whether expenses are reimbursed, and who provides the tools, equipment and supplies; and
3. **Relationship of the parties** – Are there written contracts between the Tattoo Shop and Tattoo Artist? are there employee type benefits? (insurance, vacation pay, etc...), what is the intent of the parties and how do they perceive their business relationship to each other?

Tattoo Shop Owners must weigh all relevant factors in determining whether a Tattoo Artist is an employee or independent contractor. Some of the factors may indicate that the Tattoo Artist is an employee, while other factors may indicate he or she is an independent contractor. Again, there is no clear, firmly established number of factors that would require the Tattoo Artist to be designated as an employee or independent contractor, and no one factor stands alone in making the determination. Each determination is on a case by case analysis of all relevant facts and circumstances pertaining to the Tattoo Shop. If a Tattoo Shop Owner improperly classifies an employee as an independent contractor and there is no reasonable basis for doing so, the Tattoo Shop Owner may be held liable for employment taxes for that worker. In addition, Tattoo Artists who believe they have been improperly classified as independent contractors by a Shop may file a form with the IRS and report the employee’s share of uncollected Social Security and Medicare taxes due on their compensation. To avoid these unexpected consequences, a Tattoo Shop may take advantage of an optional program called the

Voluntary Classification Settlement Program, which provides an opportunity to reclassify their workers as employees for future tax periods for employment tax purposes with partial relief from federal employment taxes. To participate, the Tattoo Shop must meet certain eligibility requirements.

If you have questions about proper classification, your tax professional, with the assistance of legal counsel, will be able to guide you through the factors. You can also request a determination from the IRS.