



Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

JANUARY 2019

FEATURE

Here's how to determine whether a worker is an independent contractor or an employee for tax purposes.

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Consider 16 Factors to Avoid Tax Liability for Worker Classification

Like any other business or organization, community associations must file taxes with the government. And tax liability is a huge issue that associations need to be aware of. Improper reporting can land the association in hot water and cost thousands in fines, penalties, and late fees. With the New Year just here, April—the month in which federal and state taxes must be filed—might seem far off. But properly doing necessary paperwork and consulting with the association's accountant can take time. So planning ahead is key.

Part of your planning should revolve around employees—that is, how and what they are paid. The use of outside, third-party workers to perform jobs, such as cleaning, in your community, is a tricky issue, rife with pitfalls if you haven't handled paying these workers properly throughout the year.

Understand Tax Law Basics

Tax law classifies workers as either “independent contractors” or “employees.” Independent contractors pay their own employment taxes. Employers are responsible for their employees' employment taxes. The IRS can audit employers to find out if the workers they call independent contractors are really employees. Some employers call workers “independent contractors” in order to avoid taxes. But if the IRS audits your association and decides to reclassify an employee that you treated as an independent contractor, you might have to come up with big tax payments, interest, and penalties.

Here are some of the factors the IRS—and state and local tax agencies—use to distinguish employees from independent contractors. Meanwhile, you can use our *Model Form: Determine Worker Status Ahead of Tax Season*, to help you decide whether to treat an individual worker as an employee or independent contractor.

Factor #1: Control. Basically, if you have the right to control and direct how a worker performs the job, the IRS says the worker is an employee, even if you and the worker have agreed otherwise.

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Worker Classification

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Factor #2: Amount of training. The more you train workers, the more likely they will be considered employees. An independent contractor should have the necessary skills, expertise, and experience to get the job done without the need for training. In answering this question on the questionnaire, keep in mind that requiring workers to attend regular company meetings that you hold for other employees is considered training.

Factor #3: Amount of supervision. The more you supervise workers, the more they will be considered employees. Supervision involves the right to control the details of how and when work is done. Unlike employees, independent contractors generally make their own decisions about how to tackle a job.

Factor #4: Control over assistants. If a worker uses assistants, look at who hired, supervised, and paid them. If you did, the worker is likely to be considered an employee. Independent contractors perform these functions themselves. For example, suppose the painter you've hired falls behind schedule. If you hire and pay assistants to help the painter catch up, you're treating the painter more as an employee than as an independent contractor. A better alternative may be to have the painter hire, supervise, and pay his own assistants.

Factor #5: Setting schedules. If you establish routines for workers, direct the sequence for performing job tasks, or set workers' schedules, you're treating them as employees. Independent contractors set their own schedules, priorities, and work patterns.

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Factor #6: Setting work hours. If you set a worker's hours, you're treating the worker more as an employee than as an independent contractor. While associations often schedule appointments with independent contractors, they usually don't require them to work set hours.

Factor #7: Compensation method. Independent contractors usually get paid by the job, not by the hour. Employees, on the other hand, are generally paid according to how much time they put in. Get a written invoice from independent contractors before you pay them. An invoice with the worker's business name, address, and telephone number is important proof that an independent contractor isn't your employee.

Factor #8: Expense reimbursements. Employers often pay business and travel expenses for employees and have control over how much they spend. Independent contractors take care of their own business and travel expenses.

Factor #9: Furnishing tools, materials, and equipment. Workers who use your tools, materials, and equipment to get the job done are more likely to be viewed as employees. If you supply the ladder, painting tools, and paint, a painter you hire would probably be classified as your employee. Independent contractors usually own their own tools and equipment and supply the necessary material.

Factor #10: Where work is done. Workers who perform all of their work in an office or workshop that is located within your community are usually considered by the IRS to be employees, because they're more likely to be under your control. A true independent contractor works at other places, too.

Factor #11: Financial risk. Employees generally don't lose money or earn a profit based on their job performance. They're paid the same amount no matter how the job turns out, although they can, of course, be fired. Independent contractors, on the other hand, have a financial stake in the jobs they do. They risk losing money on jobs that don't come out right the first time or take too long to complete.

Factor #12: Other clients. Requiring workers to report to you on a full-time or exclusive basis makes them appear to the IRS as employees. Independent contractors make their services available to the general public, advertise, and usually work at other communities, too.

Factor #13: Rehiring laid-off employees. Some associations think it's okay to lay off employees to shrink the payroll, and then hire them back to do their old jobs as "independent contractors." This is a big mistake; tax authorities are quick to reclassify such workers as employees.

Factor #14: Impact on day-to-day operations. A worker who performs day-to-day operations at your community is more likely to be considered an employee than an independent contractor.

Factor #15: Right to terminate. Associations can usually fire employees at will. But independent contractors can't get fired as long as they live up to their contractual obligations. They usually have a right to collect damages or a penalty if they're fired without cause.

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Factor #16: Right to quit. A worker who can quit and walk away from your community without any liability is usually an employee. Independent contractors usually agree to complete a certain job. If they walk out on a job, they're usually on the hook to the association for damages. ♦

**MODEL
FORM****Determine Worker Status Ahead of Tax Season**

Tax law classifies workers as either “independent contractors” or “employees,” but if you don't choose the correct classification for third-party workers, such as maintenance people, the association could be on the hook for avoidable liability—namely, fines and penalties. The answers to the following questions—which should be in the form of a “yes” or “no”—should help you narrow down whether someone should be classified as an employee or an independent contractor.

INDEPENDENT CONTRACTOR QUESTIONNAIRE

- | | | | |
|-----|--|------------------------------|-----------------------------|
| 1. | Do you train the worker or require the worker's attendance at meetings? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 2. | Do you have the right to supervise the worker or require the worker to submit regular reports? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 3. | Do you hire, supervise, and pay for the worker's assistants? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 4. | Do you establish work routines and schedules, or set the sequence of job tasks for the worker? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 5. | Do you set the worker's hours? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 6. | Do you pay the worker by the hour, week, or month? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 7. | Do you reimburse the worker's business and travel expenses? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 8. | Do you own the tools, materials, and equipment the worker uses to do the job? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 9. | Does the worker perform all of his or her work in an office or workshop located within your community? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 10. | Does the worker work for you on a full-time basis, or report exclusively to your community? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 11. | Is the worker paid the same amount, regardless of how the job comes out? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 12. | Did you rehire this worker after laying him or her off of previous employment with you? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 13. | Are the worker's services vital to your community's day-to-day operations? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 14. | Can you discharge the worker at will? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 15. | Can the worker walk away from the job before it's done without being subject to damages or penalties? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

RECENT COURT RULINGS

➤ Vineyard Wasn't a 'Business' Prohibited by Governing Documents

FACTS: Two homeowners cultivated a vineyard on their land in a planned community for the purpose of making wine to be sold to the public. The association's CC&Rs didn't prohibit the cultivation of a vineyard for this purpose, but they did prohibit "any business or commercial activity." Several other homeowners objected to the operation of what they considered to be a commercial vineyard in violation of the prohibition against any business or commercial activity. They asked the association to stop the operation of the vineyard. The association refused. The association asserted that the operation of the vineyard didn't constitute "business or commercial activity" in the literal sense of that term.

The group of homeowners sued the association. A trial court ruled in favor of the association. The group of homeowners appealed.

DECISION: A California appeals court upheld the decision of the lower court.

REASONING: The appeals court agreed with the trial court that the operation of the vineyard wasn't a prohibited business or commercial use because it didn't affect the community's residential character. The appeals court determined that, in the alternative, because the wine was made, bottled, and sold commercially offsite, there was no business or commercial activity within the meaning of the CC&Rs. The association board acted within its discretion in allowing the continued operation of the vineyard, the appeals court concluded. ♦

- Eith v. Ketelhut, December 2018

RISK MANAGEMENT

Avoid Ex-Employee Litigation with Methodical Termination Process

Managing an association involves day-to-day tasks that, while they should be done meticulously, are also not typically the impetus for lawsuits. Although you might be used to dealing with small issues that aren't the subject of litigation, don't be cavalier about bigger decisions, like how to let go of an employee who just isn't working out. No matter whether a worker's employment must be terminated for reasons that run the gamut from small—like an inability to complete tasks—to concerning—such as committing a crime—remember that you must be careful during this process. Avoiding claims of unfair termination by a former employee down the road isn't easy. Here's how you can handle employees from starting date to termination to make sure the association isn't on the hook at a later date for improperly handling letting go of one of your staff members.

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Risk Management

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Understand Risks of Poorly Handled Situation

A poorly handled termination can be costly if it turns into a lawsuit. And lawsuits brought by former employees are increasingly common. But aside from having to pay to defend itself from claims of wrongful termination, the association might also have to deal with another sticky situation: a disgruntled ex-employee who reveals too much if he feels that his termination isn't justified or wasn't handled well.

This is especially problematic if an association employee has access to confidential information, financial records, and other sensitive information. An upset ex-employee could decide to disclose information that could be very detrimental to the association—for example, the terms of a confidential construction defect settlement. Disclosure in that hypothetical situation could jeopardize the association's receipt of the funds. If disclosures about various private things are made to owners, all kinds of political annoyances could break out.

Stay Out of Termination Trouble

A first step you can take as a manager is to always keep in mind that every workplace decision—especially terminations—should be guided by job-related criteria, not by an employee's race, sex, or personal life, or by your subjective personal opinions. Making business-related and job-related decisions about problem employees can help you avoid discrimination lawsuits. And as a general rule, you should treat your employees with respect. Employees who feel that they've been humiliated or disrespected by the way you've disciplined or terminated them are more likely to look for revenge through the legal system. They also are more likely to be less discreet.

Also, if a termination violates any laws, such as the Americans with Disabilities Act (ADA), it won't be just the board of directors who could be sued—you might've opened yourself up to liability as well. If you decide to not fire the employee and to instead give him a warning, beware that disciplining an employee also can be perilous if not handled appropriately. Avoid the following termination traps to protect the association and yourself from costly legal trouble when disciplining or letting go of employees. And ask the association's attorney to help you adapt our *Model Letter: Notify Employee of Termination Justifications*, to document the reason why the employee was fired.

Trap #1: Failing to document incidents. The best step you can take when any type of issues arises with your staff is to keep good, accurate records. Don't assume that you'll be able to remember exactly what happened during the events that led to an employee's disciplinary action or termination. Records prove that your version of the story is accurate. What should you record? Every major employment decision or event for each employee—including evaluations, disciplinary warnings, and reasons for firing—should be documented. They'll help you prove "cause" for the firing as well as establish that you didn't terminate the employee in retaliation for anything or carry out the termination in violation of any laws.

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Trap #2: Flawed, inconsistent policies. An employee handbook is an invaluable tool for managing staff members. What you include in your employee manual or handbook will be community-specific. But inconsistent policies can lead to a lawsuit. That's because a court might side with a terminated employee who argues that he was fired for failing to follow a policy that was unclear or overlapped with or contradicted another rule. Inconsistencies might demonstrate to a court that you've unlawfully terminated an employee.

An employee handbook can also be helpful if you use it to lay out hard-and-fast rules that justify termination if they're broken. For example, if your employee handbook lists five offenses that require immediate dismissal, and your employee commits one or more of them, you'll have an easier time justifying a termination that's based on that objective, not subjective, criteria.

Remember that once you adopt policies, you must follow them. If you don't apply the rules uniformly and don't hold all of your staff to the same standards of performance and conduct, it'll send a mixed message that can lead to resentment from employees who are held to the rules when others are allowed to bend them. A terminated or disciplined employee has a good chance of winning his lawsuit if he can prove that you treat employees differently even though they are in the same situation.

Trap #3: Irregular or no performance evaluations. In addition to the consistency that an employee handbook provides for your staff, a regular performance evaluation schedule can keep employees on track and let them know before it's too late whether they need to change their behavior. Most important, a performance evaluation is the best proof that you acted reasonably when terminating an employee. For example, if a performance evaluation reflects that an employee was warned ahead of time to do or refrain from doing something at work or that the employee repeatedly broke rules, you'll be able to more easily justify firing him. Demonstrating a pattern of violations helps you avoid an employee's claim that the firing was arbitrary.

Performance evaluations also put a poor performer on notice and give him a chance to improve, possibly turning him into a valued worker, which saves you time and money because you won't have to go through a hiring process to replace him. An effective evaluation system can also help you reward good employees. Like handbook rules being consistently enforced, regular performance evaluations can give employees the feeling that they're being treated fairly.

In addition to performance evaluations, you should adopt an open-door policy that allows employees to talk to you about workplace problems—either that they are experiencing or that they are generally concerned about—early on. If you find and address a problem immediately, it won't get even close to the litigation stage.

Trap #4: Neglecting complaints. Once an employment problem comes to your attention, take action quickly, before it turns into a mess. Start with an oral warning. Give the employee at least one oral warning about any conduct you

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want stopped. The warning should explain exactly what the employee did or did not do, and why you don't want the misconduct repeated. If the employee ignores the oral warning and breaks the rules again, give him at least one written warning.

Satisfy Two Issues with Written Letter

If you ultimately must terminate the employee, remember to send him a written termination letter describing the misconduct that resulted in the firing. A termination letter is also useful for satisfying any written notice requirements. Your letter, like ours, should give an overall description of the employee's violations [Ltr., par. 1]. It also should describe specifically the most recent incident that led to the firing [Ltr., par. 2]. If the employee admitted to any wrongdoing, make sure to document that in the letter as well [Ltr., par. 2]. Make sure to keep a copy of the letter along with other documentation you have for the employee in your files. ♦

MODEL LETTER

Notify Employee of Termination Justifications

Eventually, you'll have to deal with an employee who doesn't perform well and must be let go. All management companies go through this process at some time, regardless of the due diligence they've performed to get competent, hard-working employees or how much they've vetted candidates for positions within the company. To avoid being faced with improper termination claims later, ask your attorney to adapt this letter to send to the employee. Keep a copy of it for your files with any other documentation you have regarding the employee's performance.

[Insert date]

Joe Jones, Maintenance Staffperson
123 Any Street
City, State 12345

Re: Immediate Dismissal

Dear Mr. Jones:

Effective immediately, you are dismissed from your position as Maintenance Staffperson. This dismissal is based on your chronic failure to follow management rules, despite both oral and written warnings.

Cause for dismissal: You have again broken the rules by using the association's charge account at XYZ Hardware Store for your personal benefit. When confronted, you admitted that over \$120 in charges had no connection to the condominium building, but were diverted for your own unauthorized use. You are dismissed from your position effective immediately.

Your dismissal is based on this incident and your prior record.

Yours truly,
Jane Manager

IN THE NEWS

Landmark HOA Legislation Presents Compliance Challenges

Important new legislation is changing how California HOAs will operate starting in 2019. Assembly Bill 2912 began with its purpose “to take important steps to protect HOA members from fraudulent activity by those entrusted with the management of the association’s finances.” The bill, which passed both houses of the Legislature on unanimous votes, is sponsored by the Community Associations Institute and the California Association of Community Managers.

One very significant change is the new Civil Code §5380(b)(6) and §5502, which require that before any transfer of \$10,000 or 5 percent of total association combined reserve and operating deposits (whichever is smaller), there must be prior written approval from the association board.

The goal is to slow down the overly active board officer or lazy manager who would pay bills or transfer funds without bothering to obtain explicit board approval. One question is whether a manager could obtain permission in advance to pay certain larger recurring bills, but the intent of the statute goes against that concept and indicates that express permission for each individual transfer should be required.

It’s up to association boards to prepare for this additional step by talking to their managers about how compliance will occur. This statute doesn’t only reference payments, but controls any “transfer” of association funds. So, advance written authorization is required not only for payments and withdrawals but also deposits and transfers between association accounts.

Civil Code §5500 has for years required boards to at least quarterly review the HOA’s operating and reserve accounts, the reserve revenues and expenses compared to budget, the latest account statements, and income and expense statements for each HOA bank account. But, in 2019, the review must now be monthly, not quarterly. And, the list of items reviewed is changed. Instead of reviewing the reserve account performance compared with the budget, the board must compare the operating account compared with the budget. Third, the check register, general ledger, and delinquency reports are added to the list of items the board must review.

The new Civil Code §5501 allows boards to meet the financial review requirements without meeting. However, the review must be performed by each director or by a subcommittee consisting of the treasurer and another director, with ratification of this review noted at the next open board meeting.

Boards should also begin exploring insurance options, as the new Civil Code §5806 requires all associations to have fidelity insurance in an amount equal to at least the total reserve funds plus three months of assessments. The insurance must include computer fraud and funds transfer fraud and must cover the association’s management company if the HOA is professionally managed. ♦

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