

# Legal Change Will Turn Some CONTRACTORS INTO EMPLOYEES

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**D**o you want to continue to work as an independent contractor rather than an employee? Starting January 1, 2009, you'll need to have an Independent Contractor Exemption Certificate (ICEC) if you work in the building construction industry and don't want to be considered an employee of the businesses you're working with.

The Minnesota legislature made this change to address the problem of workers who should be receiving the benefits of employees but are currently classified as contractors. However, this means that if you want to keep working as a contractor, you'll need to obtain a certificate from the Department of Labor and Industry (DLI). If you don't have the certificate, the state will automatically consider you an employee of the contractor for whom you're working.

So how do you get one of these certificates? You need to complete and submit an application showing that you meet the conditions required to operate as an independent contractor. To do that you have to be able to meet the conditions set out in the new law's nine-factor test [see the bulleted list at the end of this article for those nine factors].

When you get the ICEC document, you're not locked into always working as an independent contractor. Holding the certificate means you have a choice as to whether you're considered an employee or an independent contractor. This is determined by each particular work relationship.

Starting this September, the DLI will have the ICEC application available on its Web site at [www.doli.state.mn.us/ic](http://www.doli.state.mn.us/ic). The application and the renewal fee for the certificate are each \$150. Independent contractors will be required to renew their exemption certificate every two years.

As a business owner, contractors will now be obligated to verify that the workers with whom they enter into agreements as independent contractors have a current exemption certificate and are required to

maintain a copy of the certificates for five years. The DLI will maintain a list of certificate holders on its Web site, and certificates for those individuals will be available for download.

Individuals and contractors who fail to comply with the law are subject to a penalty of up to \$5,000 for each violation and will be reported to workers' compensation, unemployment insurance and revenue regulation for further action.

A contractor paying other independent contractors must periodically review the status of their certificates to see that they are properly classified. If workers are considered to be employees, your enterprise must withhold federal income tax, social security/Medicare taxes, and federal unemployment taxes on wages you pay them. You may also have to provide them with the same fringe benefits and retirement plan coverage available to any other employees. There may be state tax obligations as well. If a worker is classified as an independent contractor, your business simply cuts them a check for their services and sends them a Form 1099-MISC at year-end.

Under the "common law" rules developed by the courts, a worker generally is an employee for federal tax purposes if the employer has the right to control and direct the worker regarding the job he is to do and how he is to do it. The employer doesn't have to actually direct or control how the services are performed, it's enough if the employer has the right to do so.

To be an independent contractor, in addition to having an ICEC, an individual must meet the following conditions:

- Maintains a separate business with the individual's own office, equipment, materials and other facilities;
- Holds or applied for a federal employer identification number or has filed business or self-employment income tax returns with the Internal Revenue Service if the person has performed services in the previous year

for which the individual is seeking the ICEC;

- Operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means of performing the services;
- Incurs the main expenses related to the service the individual performs under contract;
- Is responsible for the satisfactory completion of services that the individual contracts to perform and is liable for failure to complete the services;
- Receives compensation for services performed under contract on a commission or per-job or competitive bid basis and not on any other basis;
- May realize a profit or suffer a loss under contract to perform services;
- Has continuing or recurring business liabilities or obligations; and
- The success or failure of the individual's business depends on the relationship of the business receipts to expenditures.

To determine eligibility for an ICEC, individuals will be required to submit as part of the application information and documentation showing they meet the above nine factors.



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