

## Consultancy Contracts

The foreign company can not employ an Indian national directly as an employee in india unless it complies with registration requirements such as shops and establishments and other labour laws, even if the employees work from home or in an office hired by the employee, where the employee gets directly paid into his bank account and also receives other benefits from the company, it will be considered as a commercial entity and a permanent establishment. The company will have to deduct TDS from the salary payable under S.192 of the Income Tax Act and pay it to the government.

The section states that “every person responsible for paying any income, which is chargeable under the head salary, shall deduct income tax on the estimated income of the assessee”.

Thus the company will require a TAN and will have to file quarterly returns. They should issue a salary certificate to the employees. The employee may also deposits his tax liability on a monthly basis as would have been done by the foreign company.

If they are appointed as consultants/ contractors/freelancers no TDS is applicable and compliance with labour laws are not required.

The Companies Act 2013 has widened the definition of foreign companies to include those having an agent/ having office through electronic mode without opening a physical office in india. This would require a foreign company to comply with the maintenance of financial records and reporting requirements.

Business in India can be done by appointing an agent. Such arrangements are subject to Tax withholding rules in India.

In case a person is being paid from abroad may have different taxation implications like the double taxation norm, RBT etc.

Employee v. Independent Contractor

Consultants are also known as independent contractors. In many respects, there seems to be no difference at all. Often, independent contractors and employees do similar or similar work in the same company.

Employment status of an employee often determines certain issues in labour law compliance, tax liabilities and implications and employment benefits etc.

The main points of difference between the two are

1. An independent contractor may set his own hours of work. He works relatively independently. The contractor may decide how to go about accomplishing the tasks without the employer input.
2. The employer needs not to give employment benefits to an independent contractor.

3. The independent contractor incurs the costs associated with the job.
4. Employees receive the net salary after the employer has withheld the tax. However, in the case of independent contractors there is no tax withholding. He pays his own income tax.
5. The contract may be terminated at the will of the employer if the contract provides so. Thus the termination needs to be in accordance with the labour laws unlike in the case of employees.

However these are subject to the terms of the contract between the employer and the independent contractor. If the contract is carefully drafted the employer will be able to restrict the independence of the contractors. However restricting the independence of the contractor and controlling the manner of doing the work same as in the case of an employee, may convert the status of the consultant into the status of an employee. Thus courts and administrative authorities may refuse to read the contract as a consultancy contract.

The requirements of consultancy

Consultancy agreements are entered into when a business wishes to engage a contractor to provide a specific service to them. It is not intended that the consultants will be employees of the company and the consultancy agreements set that out clearly.

The consultant will provide service to the company for the term of the contract. Once the term is over or the agreement is terminated on any other ground the relationship will end.

The consultancy agreement must include :-

1. Appropriate legal provisions
2. Consultant's obligations
3. Consultant's status
4. Consultant's fees and expenses
5. Duration and Termination
6. Matters after termination
7. Confidentiality
8. IP protection and ownership