

EMPLOYEE OR INDEPENDENT CONTRACTOR?



An employer must generally withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment taxes on wages paid to an employee. An employer does not generally have to withhold or pay any taxes on payments to independent contractors.

People such as lawyers, contractors, accountants, etc., who follow an independent trade, business, or profession in which they offer their services to the public, are generally not employees. However, whether such people are employees or independent contractors depends on the facts in each case. The general rule is that an individual is an independent 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*.

Common-Law Rules

To determine whether an individual is an independent contractor, the relationship of the worker and the parish must be examined. Facts that provide evidence of control and independence fall into three (3) categories: behavioral control, financial control, and the type of relationship of the parties.



Behavioral Control (Instructions & Training)

Does the parish direct and control how the worker does the task that he or she was hired for? Employee's must comply with instructions about when, where, and how to work. Even if no instructions are given, the control factor is present if the parish has the right to control how the work results are achieved. The following are examples of types of instructions on how to do the work:

- *When and where to do the work*
- *What tools or equipment to use*
- *What workers to hire or assist with the work*
- *Where to purchase supplies and services*
- *What work must be performed by a specific individual*
- *What order or sequence must be followed to get the job done*

An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

Financial Control

Independent contractors are more likely to have unreimbursed expenses than employees. An independent contractor is generally free to seek out business opportunities. They often advertise and maintain a visible business location.



An employee is generally guaranteed a regular wage amount for a specific period of time. An independent contractor is usually paid a flat fee for the job.

Relationship of the Parties

An independent contractor may request a written contract between he or she and the parish for the work to be done.

If you engage a worker with the expectation that the relationship will continue indefinitely rather than for a specific project or period, this is generally considered evidence that your intent was to create an employer-employee relationship.



To help you determine whether an individual is an employee under the common-law rules, the IRS has identified 20 factors that are used as guidelines to determine whether sufficient control is present to establish an employer-employee relationship. Not every factor is applicable in every situation, and the degree of importance of each factor varies depending on the type of work and individual circumstances. However, all relevant factors are considered in making a determination, and no one factor is decisive.



If an employer treats an employee as an independent contractor and the relief provisions discussed earlier do not apply, the person responsible for the collection and payment of withholding taxes may be held personally liable for an amount equal to the taxes that should have been withheld.

Guidelines in Indicating Whether an Individual is an Employee or an Independent Contractor . . .

- ◆ Instructions—An employee must comply with instructions about when, where, and how to work. Even if no instructions are given, the control factor is present if the employer has the right to control the work results achieved.
- ◆ Training—An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods and receive no training from the purchasers of their services.
- ◆ Integration—An employee's services are usually integrated into the business operations because the services are important to the success or continuation of the business. This shows that the employee is subject to direction and control.
- ◆ Services Rendered Personally—An employee renders services personally. This shows that the employer is interested in the methods as well as the results.
- ◆ Hiring Assistants—An employee works for an employer who hires, supervises, and pays workers. An independent contractor can hire, supervise, and pay assistants under a contract that requires him or her to provide materials and labor and to be responsible only for the result.
- ◆ Continuing Relationship—An employee generally has a continuing relationship with an employer. A continuing relationship may exist even if work is performed at recurring although irregular intervals.
- ◆ Set Hours of Work—An employee usually has set hours of work established by an employer. An independent contractor generally can set his or her own work hours.
- ◆ Full-time Required—An employee may be required to work or be available full-time. This indicates control by the employer. An independent contractor can work when and for whom he chooses.





- ◆ **Work Done on Premises**—An employee usually works on the premises of an employer, or works on a route or at a location designated by the employer.

- ◆ **Order or Sequence Set**—An employee may be required to perform services in the order or sequence set by an employer. This shows that the employee is subject to direction and control.

- ◆ **Reports**—An employee may be required to submit reports to an employer. This shows that the employer maintains a degree of control.

- ◆ **Payments**—An employee is paid by the hour, week, or month. An independent contractor is usually paid by the job or on a straight commission.
- ◆ **Expenses**—An employee's business and travel expenses are generally paid by an employer. This shows that the employee is subject to regulation and control.
- ◆ **Tools and Materials**—An employee is normally furnished significant tools, materials, and other equipment by an employer.
- ◆ **Investments**—An independent contractor has a significant investment in the facilities he or she uses in performing services for someone else.
- ◆ **Profit or Loss**—An independent contractor can make a profit or suffer a loss.
- ◆ **Works for More than One Person or Firm**—An independent contract is generally free to provide his or her services to two or more unrelated persons or firms at the same time.
- ◆ **Offers Services to General Public**—An independent contractor makes his or her services available to the general public.



- ♦ Right to Fire—An employee can be fired by an employer. An independent contractor cannot be fired so long as he or she produces a result that meets the specifications of the contract.
- ♦ Right to Quit—An employee can quit his or her job at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion, or is legally obligated to make good for failure to complete it.



<NOT ENTIRELY SURE>

These tests focus on the degree of control the employer has over the worker. As we said, they can still be subjective. If, after examining these guidelines, and you are still not sure if a worker is an employee or not, you may file the five page Form SS-8 (Information for Use in Determining Whether a Worker is an Employee for Federal Employee Taxes and Income Tax Withholding) with the IRS to request an official determination.

Refer to Appendix M for Form SS-8 Determination of Worker Status