

## IRS's “common law” test to determine independent contractor/employee status

It's critical for an enterprise periodically to review the status of its workers and see if they are properly classified. An enterprise must withhold federal income tax, social security taxes, and federal unemployment taxes on wages it pays workers who are employees. It also may have to provide them with the same fringe benefits and retirement plan coverage available to its other employees. There may be state tax obligations as well. By contrast, these responsibilities don't apply for workers who are independent contractors. The business simply cuts them a check for their services and sends them a Form 1099-MISC.

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. IRS usually applies the following factors to see if the employer has the right to direct and control the worker:

- A worker who must comply with instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the business has the right to make the worker follow instructions. However, instructions regarding government standards are given little weight, as is the absence of instructions for professionals such as attorneys, who must follow the rules of their profession.
- Training a worker by teaming an experienced employee with the worker, by corresponding with the worker, by requiring him or her to attend meetings, or by using other methods, indicates the business wants the services performed in a particular method or manner. Ongoing training is a particularly strong sign of an employer-employee relationship, but orientation or information programs about company policies aren't.
- Integration of the worker's services into the business operations generally shows the worker is subject to direction and control.
- If the services must be rendered personally, the business probably is interested in the methods used to accomplish the work as well as in the results.
- A business that hires, supervises, and pays assistants for a worker is exhibiting employer-like control over the worker on the job. Conversely, an independent contractor relationship is indicated if a worker is contractually obligated to hire, supervise, and pay assistants.
- A continuing relationship between the worker and the business indicates an employer-employee relationship exists. A continuing relationship may exist where the worker is called in at frequently recurring, although irregular, intervals.
- The fact that a business requires work to be performed on its premises suggests control over the worker (if the work could be done elsewhere). Work done off the premises, such as at the worker's office, indicates some freedom from control. The importance of this factor depends on the type of services involved and whether an employer generally would require employees to do similar work on its premises.
- A business exhibits control over a worker if it requires him or her to perform services in a specific order or sequence.

- A business's requirement that the worker submit regular or written reports indicates a degree of control over the worker.
- Payment by the hour, week, or month generally points to an employer-employee relationship, if this method of payment isn't just a convenient way of paying a lump-sum agreed upon as the cost of a job. Payment by the job or on a straight commission basis generally indicates a worker is an independent contractor.
- A business exhibits characteristics of an employer if it supplies a worker with significant tools, materials, and other equipment, or ordinarily pays the worker's business and/or traveling expenses.
- A worker exhibits independent contractor status if he or she invests in facilities that aren't typically maintained by employees (e.g., renting his or her own office). By contrast, an employee usually relies on the employer to provide the facilities needed to do the job.
- A worker who can realize a profit or suffer a loss as a result of his or her services generally is an independent contractor, but a worker who can't is an employee. The risk that a worker won't be paid isn't factored in.
- A worker who performs more than minimal services for a number of unrelated businesses at the same time generally is an independent contractor. However, a person who works for more than one business may be an employee of each business, especially where the businesses are part of the same service arrangement.
- The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
- The right to fire a worker is a factor indicating that he or she is an employee. An independent contractor on the other hand, can't be fired as long as he or she produces the work that was contracted-for.

There is no litmus test for exactly how many of these factors must be satisfied, nor are these factors uniformly applied. Please call our offices if you would like to arrange for an appointment to see whether your workers are classified properly.