

III. PERSONNEL

Effective Date: April 21, 2008

B. EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

It is very important for an organization or business to make an accurate determination as to whether payments for services rendered are being made to an employee or to a non-employee (independent contractor). Generally, anyone who performs services is an employee if the employer can control what will be done and how it will be done. This is so even when the employer gives the employee freedom of action. What does matter is the fact that the employer has the legal right to control the method and results of the services.

If an employer-employee relationship exists, it does not matter what the relationship is called. It also does not matter how payments are measured or paid, what the payments are called, or whether the employee works full or part-time.

It should be noted that when an employer incorrectly treats an individual as an independent contractor rather than an employee, the employer becomes liable for income tax and employee/employer social security/Medicare taxes which were not withheld on payments to the employee. Therefore, a severe penalty results when there is a misclassification of an individual providing services to an organization.

Normally, people in business for themselves, such as doctors, lawyers, CPAs, construction contractors, and others in an independent trade in which they offer their services to the public are not employees. However, there is not always a clear distinction which can be drawn as to whether a person providing services is an employee or an independent contractor.

The Internal Revenue Service has identified 20 factors that are to be 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.

It does not matter that a written agreement may take a position with regard to any factors or state that certain factors do not apply, if the facts indicate otherwise. If an employer treats an employee as an independent contractor when in fact there is an employee relationship, 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.

The twenty factors indicating whether an individual is an employee or an independent contractor are:

1. 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 how the work results are achieved.

2. 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.

3. 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.

4. Services Rendered

An employee renders services personally. This shows that, the employer is interested in the methods as well as the results.

5. 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.

6. 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.

7. 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.

8. Full-time Requirement

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 or she chooses.

9. 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 an employer.

10. Order of 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.

11. Reports

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

12. Payments

An employee is generally paid by the hour, week, or month. An independent contractor is usually paid by the job or on a straight commission.

13. 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.

14. Tools and Materials

An employee is normally furnished significant tools, materials, and other equipment by an employer.

15. Investment

An independent contractor has a significant investment in the facilities he or she uses in performing services for someone else.

16. Profit or Loss

An independent contractor can make a profit or suffer a loss.

17. Works for More Than One Person or Firm

An independent contractor is generally free to provide his or her services to two or more unrelated persons or firms at the same time.

18. Offers Services to General Public

An independent contractor makes his or her services available to the general public.

19. 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.

20. 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.

If you are unable to determine from the preceding guidelines whether there is an actual employer-employee relationship, you can file with the Internal Revenue Service District Director a FORM SS-8, "Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding."