



Independent Contractor Enforcement

With shrinking public budgets, the government is proactively seeking additional sources of revenue by cracking down on organizations that are misclassifying independent contractors. The OBAMA administration has targeted some \$7,000,000,000 to be collected from organizations that are misclassifying employees as independent contractors. 6000 companies will be audited in 2010, and a 10 year program has been developed adding in many new auditors to conduct 70,000 to 80,000 audits. Anyone who has independent contractor, 1099 employees, need to take a serious look at their use of these contractors to ensure compliance with the law. The implications of misclassifying someone not only include payment of back taxes and penalties, but can also include risk related to workers compensation injury where an independent contractor is injured and does not have workers compensation insurance.

INDEPENDENT CONTRACTOR BENEFITS

Organizations are motivated to use independent contractors where possible for the following reasons:

- o Reduced matching of Social Security Tax;
- o No unemployment or Medicare taxes;
- o No workers compensation insurance;
- o Elimination of the need to provide insurance benefits;
- o And overall reduced employment liability.

IRS EMPLOYEE STATUS TEST

The IRS formerly used what has become known as the "Twenty Factor" test. Under pressure from Congress and from representatives of labor and business, it has attempted to simplify and refine the test, consolidating the twenty factors into eleven main tests, and organizing them into three main groups: behavioral control, financial control, and the type of relationship of the parties. Those factors appear below, along with comments regarding each one (source: IRS Publication 15-A, 2006 Edition, page 6; available for downloading from <http://www.irs.gov/pub/irs-pdf/p15a.pdf> (PDF)).

I. BEHAVIORAL CONTROL

Does the company control or have the right to control what the worker does and how the worker does his or her job? This depends on the type and degree of instructions and training given to the worker.

Instructions the business gives the worker. An employee is generally subject to the business' instructions about when, where, and how to work. All of

the following are examples of types of instructions about how to do work:

- o When and where to do the work
- o What tools or equipment to use
- o What workers to hire or to assist with the work
- o Where to purchase supplies and services
- o What work must be performed by a specified individual
- o What order or sequence to follow

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

- *Training the business gives the worker.* An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

II. FINANCIAL CONTROL

Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.). Facts that show whether the business has a right to control the business aspects of the worker's job include:

- *The extent to which the worker has unreimbursed business expenses.* Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services they perform for their business.
- *The extent of the worker's investment.* An employee usually has no investment in the work other than his or her own time. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a

significant investment is not necessary for independent contractor status.

- ***The extent to which the worker makes services available to the relevant market.*** An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.
- ***How the business pays the worker.*** An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.
- ***The extent to which the worker can realize a profit or loss.*** Since an employer usually provides employees a workplace, tools, materials, equipment, and supplies needed for the work, and generally pays the costs of doing business, employees do not have an opportunity to make a profit or loss. An independent contractor can make a profit or loss.

III. TYPE OF RELATIONSHIP

Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business? Facts that show the parties' type of relationship include:

- ***Written contracts describing the relationship the parties intended to create.*** This is probably the least important of the criteria, since what really matters is the nature of the underlying work relationship, not what the parties choose to call it. However, in close cases, the written contract can make a difference.
- ***Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.*** The power to grant benefits carries with it the power to take them away, which is a power generally exercised by employers over employees. A true independent contractor will finance his or her own benefits out of the overall profits of the enterprise.
- ***The permanency of the relationship.*** If the company engages 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 the intent was to create an employer-employee relationship.
- ***The extent to which services performed by the worker are a key aspect of the regular business of the company.*** If a worker provides services that are a key aspect of the company's regular business activity, it is more likely that the company will have the right to direct and control his or her activities. For example, if

a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

Businesses must weigh all these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no "magic" or set number of factors that "makes" the worker an employee or an independent contractor, and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another.

The key is to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

Form SS-8

If, after reviewing the three categories of evidence, it is still unclear whether a worker is an employee or an independent contractor, [Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding](#) (PDF) can be filed with the IRS. The form may be filed by either the business or the worker. The IRS will review the facts and circumstances and officially determine the worker's status. It is often useful even to fill out the form without turning it in to give you a good indication.

Do not underestimate the difficulty of applying these standards to specific individuals performing services. In doubtful cases, always consult a knowledgeable specialist or employment law attorney.

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Resources:

1. <http://www.irs.gov/businesses/small/article/0,,id=99921,00.html>
2. http://www.twc.state.tx.us/news/eft/appx_d_irs_ic_test.html

Compliance Review Assistance?

Contact HR Service, Inc. to review your organization's employment law compliance or independent contractors. Call: (801) 685-8400, Email: Ken@HRServiceInc.com, or visit us online at: WWW.HRServiceInc.com.