

# INDEPENDENT CONTRACTOR REVIEW



Employers must review multiple factors when determining whether a worker is an employee or an independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. No one factor stands alone in making this determination. Employers should look at the entire relationship considering the degree of control and independence.

Misclassifying an employee as an independent contractor can result in fines and penalties with the IRS; therefore, it is important to review the information and questions below to help in making a final determination. The IRS considers common-law rules to help an Employer determine the degree of control and independence when determining independent contractor status. There are three categories to consider during the review:

## 1. BEHAVIORAL

Does the company control or have the right to control what the worker does and how the worker does his or her job?

## 2. FINANCIAL

Are the business aspects of the worker's job controlled by the payer?  
(these include things like how the worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)

## 3. 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?  
What is the permanency of the relationship?

Employers must understand that the determination as an employee or independent contractor does also affect tax liability, benefits eligibility, and the manner in which duties are performed. For example:

## ➔ TAXATION

Employees provide their employers with a federal W-4 form or appropriate state tax forms. Employers submit to the Internal Revenue Service (IRS) and state revenue departments a percentage of employees' gross pay for appropriate income tax withholding, as well as the employer's share of income tax for each individual they employ.

Independent contractors provide companies with the federal W-9 form. Independent contractors are subject to self-employment tax and must calculate and remit income taxes directly to the IRS. Companies do not remit taxes on behalf of independent contractors, nor do they make an employer contribution on behalf of contractors.

## ➔ BENEFITS

Employees have health benefits with their employers. This includes group health care benefits, short-term disability insurance, employee assistance programs, and retirement income savings accounts. For group health care, the employee may be responsible for a relatively small portion of the total premium cost, which is deducted from the employee's gross pay.

Independent contractors are not entitled to employee benefits. They are, however, entitled to deduct certain health insurance premium costs from their income when they file their tax returns. Also, independent contractors are not eligible to participate in employers' retirement savings plans, such as 401k or 403b plans, nor are they entitled to any additional compensation to supplement their own retirement savings accounts or individual retirement accounts.

## ➔ MANNER OF WORK

Employees usually must follow the employer's directives in the performance of job duties, tasks, and responsibilities and how they are to be performed on a routine basis.

Independent contractors may be provided with a list of responsibilities or project deliverables; however, the manner in which the tasks or deliverables are completed is up to the contractor's discretion. A contractor exercises independent judgment in determining how to perform the tasks and is usually responsible to the company only for the outcomes or results.

## EMPLOYEE OR CONTRACTOR?

The determination on whether an individual is an employee or independent contractor is not a decision that should be made without careful consideration. On the next page are questions to help employers evaluate whether an individual is an employee or an independent contractor. No one factor is more indicative of employee status than another. If there is a high number of "yes" marks, then it will most likely indicate there is an employment relationship; a high number of "no" marks may or may not indicate a contractor relationship.

The important thing to remember when evaluating the status is who has the right to control the work as to when and how it is completed.

## QUESTIONS FOR EVALUATION

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- 1 Is the worker required to comply with the employer's instructions about when, where, and how to work?
- 2 Is training required? Does the worker receive training from or at the direction of the employer, including attending meetings and working with experienced employees?
- 3 Are the worker's services integrated with the activities of the company? Does the success of the employer's business significantly depend upon the performance of services that the worker provides?
- 4 Is the worker required to perform the work personally?
- 5 Does the worker have the ability to hire, supervise, and pay assistants for the employer?
- 6 Does the worker have a continuing relationship with the employer?
- 7 Is the worker required to follow set hours of work?
- 8 Does the worker work full-time for the employer?
- 9 Does the worker perform work on the employer's premises and use the company's office equipment?
- 10 Does the worker perform work in a sequence set by the employer? Does the worker follow a set schedule?
- 11 Does the worker submit regular written or oral reports to the employer?
- 12 How does the worker receive payments? Are there payments of regular amounts at set intervals?
- 13 Does the worker receive payment for business and travel expenses?
- 14 Does the worker rely on the employer for tools and materials?
- 15 Has the worker made an investment in the facilities or equipment used to perform services?
- 16 Is the payment made to the worker on a fixed basis regardless of profitability or loss?
- 17 Does the worker only work for one employer at a time?
- 18 Are the services offered to the employer unavailable to the general public?
- 19 Can the worker be fired by the employer?
- 20 Can the worker quit work at any time without liability?

There is an option to pursue an IRS ruling on final determination if an employer is unsure based upon the responses to the questions above and needs further guidance. Employers and workers can file Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding) to get a determination from the IRS as to whether or not a worker is an independent contractor. This form can be found at: <https://www.irs.gov/pub/irs-pdf/fss8.pdf>. Employers should also follow applicable local law; California employers must follow AB5, for instance.

If an employer is having doubts about whether or not a worker can be classified as an independent contractor or should be an employee, the most conservative approach would be to classify as an employee and comply with applicable tax and employment laws. When in doubt, play it safe.

**For more information, view U.S. Department of Labor Resources:**

-  [Get the Facts on Misclassification Under the Fair Labor Standards Act](#)
-  [Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act \(FLSA\)](#)

Legal notice - The purpose of this information is to assist in the discussion of risk, concerns, and general requirements. It is not tax advice, legal advice, or judgment of a business's compliance or non-compliance. We recommend that you seek qualified legal counsel familiar with your particular circumstances before taking any action.