
Independent Contractors (Reg. 31.3401(c)-1(b))

Several factors come into play in determining whether someone is an employee or an independent contractor. In 1987, the IRS published a list 20 factors to consider¹, but additional factors are likely to require consideration in practice. In fact, there have been numerous court decisions on this subject.

In very general terms, someone is an employee if the employer specifies both the methods for accomplishing a task and the specific results. In some situations, it may be advisable to request a ruling from the IRS or to have an attorney review the facts and circumstances.

Generally, independent contractors are not considered employees for qualified plan purposes, but full-time life insurance producers are exceptions and are considered employees for qualified plan purposes.

Instructions

A worker who is required to comply with other persons' instructions about when, where, and how to work ordinarily is an employee. This control factor is present if the person for whom the services are performed has the *right* to require compliance with instructions.²

Training

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person for whom the services are performed wants the services performed in a particular method or manner.³

1. Notice 87-41. Also see *Nationwide Mutual Insurance Co. v. Darden* (503 U.S. 318 (1992)).

2. Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

3. See Rev. Rul. 70-630, 1970-2 C.B. 229

Integration

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to a material extent on the performance of certain services, workers performing those services necessarily must be subject to a certain amount of control by the owner of the business.⁴

Services Rendered Personally

If services must be rendered personally, presumably the person for whom the services are performed is interested in the methods used to accomplish the work as well as in the results.⁵

Hiring, Supervising, and Paying Assistants

If the person for whom the services are performed hires, supervises, and pays assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants according to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.⁶

Continuing Relationship

A continuing relationship between the worker and the person for whom the services are performed indicates an employer-employee relationship. A continuing relationship may exist where work is performed at frequently recurring (although irregular) intervals.⁷

Set Hours of Work

Establishing set hours of work by the person for whom the services are performed indicates control.⁸

Full Time Required

If the worker must devote substantially full time to the business of the person for whom the services are performed, such person has control over the amount of time the worker spends working and impliedly restricts the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses.⁹

4. United States v. Silk, 331 U.S. 704 (1947), 1947-2 C.B. 167

5. Rev. Rul. 55-695, 1955-2 C.B. 410

6. Rev. Rul. 63-115, 1963-1 C.B. 178, with Rev. Rul. 55-593 1955-2 C.B. 610

7. United States v. Silk

8. Rev. Rul. 73-591, 1973-2 C.B. 337

9. Rev. Rul. 56-694, 1956-2 C.B. 694

*Doing Work on
Employer's Premises*

If the work is performed on the premises of the person for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere.¹⁰ Work done off the premises of the person receiving the services (such as at the office of the worker) indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require employees to perform such services on the employer's premises. Control over the place of work is indicated when the person for whom the services are performed has the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.¹¹

*Order of Sequence
Set*

If a worker must perform services in the order or sequence set by the person for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person for whom the services are performed. Often, because of the nature of an occupation, the person for whom the services are performed does not set the order of the services or set the order infrequently. However, it is sufficient to show control if such person retains the right to do so.¹²

*Oral or Written
Reports*

A requirement that the worker submit regular or written reports to the person for whom the services are performed indicates a degree of control.¹³

*Payment by Hour,
Week, Month*

Payment by the hour, week, or month generally points to an employer-employee relationship, provided it is not just a convenient way of paying an amount agreed upon as the cost of a job.¹⁴

*Payment of Business
and/or Traveling
Expenses*

If the person for whom the services are performed ordinarily pays the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.¹⁵

10.Rev. Rul. 56-660, 1956-2 C.B. 693

11.Rev. Rul. 56-694

12.Rev. Rul. 56-694

13.Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431

14.Rev. Rul. 74-389, 1974-2 C.B. 330

15.Rev. Rul. 55-144, 1955-1 C.B. 483

Furnishing of Tools and Materials

The fact that the person for whom the services are performed furnishes significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.¹⁶

Significant Investment

If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.¹⁷ Special scrutiny is required with respect to certain types of facilities, such as home offices.

Realization of Profit or Loss

A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) generally is an independent contractor, but the worker who cannot is an employee.¹⁸ For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses (such as salary payments to unrelated employees), that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

Working for More than One Firm at a Time

If a worker performs more than *de minimis* services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor.¹⁹ However, a worker performing services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

Making Service Available to General Public

The fact that a worker makes services available to the general public on a regular and consistent basis indicates an independent contractor relationship.²⁰

16. Rev. Rul. 71-524, 1971-2 C.B. 346

17. Rev. Rul. 71-524

18. Rev. Rul. 70-309

19. Rev. Rul. 70-572, 1970-2 C.B. 221

20. Rev. Rul. 56-660

Right to Discharge

The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired as long as the independent contractor produces a result that meets the contract specifications.²¹

Right to Terminate

If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.²²

21.Rev. Rul. 75-41, 1975-1 C.B. 323

22.Rev. Rul. 70-309