

Guide To The Twenty Questions

Employee vs Independent Contractor?

The IRS uses the 20 Common Law factors as a guideline when determining if sufficient control is present to establish an employer-employee relationship. This guide lists each factor and provides elements characteristic of both employee and independent contractor. The degree of importance of each factor varies depending on the occupation and the scope of work being performed.

Under the common-law test, an employer-employee relationship is present when the person for whom services are performed has the **right** to control and direct the individual who performs the services as to both:

- A. The **result** to be accomplished by the work, and
- B. The **details and methods** used in achieving the end result

It is not necessary that the hiring firm overtly direct or control the means and methods by which a result is to be accomplished - all that is required is that they have the **right to do so**.

1. Instructions

A worker who must comply with another persons' instructions about when, where and how he or she is to work is ordinarily an employee. If the service recipient has the right to require compliance with instructions, or require completion of a different scope of work using specified guidelines, it is likely that an employer-employee relationship exists.

EMPLOYEE	INDEPENDENT CONTRACTOR
Must follow set and/or mandatory instructions, where, when, how to perform work.	Follows own individual instructions. Performs work based upon independently established procedures or industry specs.

2. Training

Training a worker to complete the task at hand or requiring a worker to attend meetings and receive direction are factors indicative of an employer-employee relationship. Training a worker in specific methods indicates that the service recipient wants the services accomplished in a certain manner. Voluntary uncompensated training may not be an indication of an employer-employee relationship.

EMPLOYEE	INDEPENDENT CONTRACTOR
Receives and/or is required to receive training.	Skilled professional requiring no training to adequately perform services.

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3. Integration of Services

When the success of a particular project is dependent upon the performance of certain services, especially for a lengthy period in ongoing manner, the worker who performs those services must necessarily be subject to a certain amount of control by the service recipient. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control.

EMPLOYEE	INDEPENDENT CONTRACTOR
Provides essential services which meld into overall business operation.	Work performed is not an "integral part," it is a "unique" service.

4. Services Rendered Personally

By requiring a worker to perform the contracted services personally, presumably the service recipient is interested in the means and methods used to accomplish the work in addition to the results.

EMPLOYEE	INDEPENDENT CONTRACTOR
Required to render services personally.	Has assistants or employees while retaining the right to hire others to perform the required work.

5. Hiring, Supervising, and Paying Assistants

If the service recipient supervises the hiring process and paying of assistants, that factor generally shows control over the workers on the job. However, if the worker performs the hiring, supervision and pays assistants and is responsible only for the attainment of a result, this factor is indicative of an independent contractor.

EMPLOYEE	INDEPENDENT CONTRACTOR
Does not supervise or hire others.	Hires assistants at his or her expense to perform all or part of project.

6. Regular and Continuous Relationship

A continuing relationship not based on projects between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists.

EMPLOYEE	INDEPENDENT CONTRACTOR
Services are part of a continuing relationship.	Provides services and contracts for separate and distinct projects, not on continuing basis.

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7. Set Hours of Work

Requiring the work to be performed at set hours indicates control by the service recipient over the worker and is indicative of an employer - employee relationship.

EMPLOYEE	INDEPENDENT CONTRACTOR
Required to work set hours.	Retains right to complete work at any time.

8. Full Time Required

If the worker must devote substantially full time to the business and is not working on a project basis, the worker may be limited from performing services elsewhere and to some extent is being controlled. An independent contractor is free to perform work for other clients as he or she chooses.

EMPLOYEE	INDEPENDENT CONTRACTOR
Required to devote full-time to a job on a Non-project basis.	Contract specifies what is to be accomplished by what date.

9. Doing Work on Employer's Premises

If the service recipient requires the worker to perform the work on-site and the work could be done elsewhere, this factor suggests control.

EMPLOYEE	INDEPENDENT CONTRACTOR
Required to work on-site, when alternatives exist.	Rents/leases location where work is performed.

10. Order or Sequence Set

If a worker must perform services in the order or sequence set by the service recipient, this factor shows that the worker is not free to follow the worker's own pattern of work. The worker should maintain this right. Adherence to an established industry or technical standard is generally not regarded as control on the part of the service recipient.

EMPLOYEE	INDEPENDENT CONTRACTOR
Required to perform task in set manner, routine, schedule.	Has full discretion over routine or manner in which to perform services.

11. Oral or Written Reports

Requiring the worker to submit regular oral or written reports indicates a degree of control. Quality assurance checks with no evaluation system may not indicate an employer-employee relationship.

EMPLOYEE	INDEPENDENT CONTRACTOR
Required to submit regular oral and/or written work reports where work is evaluated.	Has few or no obligations to file regular written or oral reports.

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12. Payment by Hour, Week, Month

Payment by the hour, week, or month generally points to an employer-employee relationship. Contracts structured with payment made by the job or on a fixed fee basis indicates that the worker is an independent contractor.

EMPLOYEE	INDEPENDENT CONTRACTOR
A person is paid at regular intervals.	Compensation determined separately by project or based on fixed fee.

13. Payment of Business and/or Traveling Expenses

Ordinarily employees are reimbursed for travel or business related expenses. An employer, to be able to control expenses, generally retains the right to regulate the worker's business activities. An independent contractor incurs and pays travel and incidental costs as part of his/her ongoing business expenses.

EMPLOYEE	INDEPENDENT CONTRACTOR
Expenses are paid or reimbursed.	No reimbursement for out-of-pocket expenses.

14. Furnish Tools or Equipment

The furnishing of significant tools, materials, and other equipment, tends to reduce the workers risk of loss and lean towards the existence of an employer-employee relationship.

EMPLOYEE	INDEPENDENT CONTRACTOR
Tools and materials are furnished.	Furnishes own tools and materials.

15. Significant Investment

If the worker invests in facilities that are used in performing services that factor tends to indicate that the worker is an independent contractor. Particularly if part of this investment requires ongoing overhead or maintenance costs. Lack of investment in facilities indicates dependence on the service recipient for such facilities, and accordingly, the existence of an employer-employee relationship.

EMPLOYEE	INDEPENDENT CONTRACTOR
Does not invest in facilities and/or equipment used to perform work.	Possesses and invests in facilities and equipment to perform services.

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16. Realization of Profit or Loss

A worker who can realize a profit or suffer a loss as a result of performing the contracted services is generally an independent contractor. Independent contractors are considered businesses. A business inherently incurs certain financial risks and can realize profits while employees do not.

EMPLOYEE	INDEPENDENT CONTRACTOR
Compensated for services at fixed rate regardless of profitability.	Shoulders the possibility of incurring a loss and realizing a profit.

17. Major Source of Income (Working for more than one firm at a time).

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EMPLOYEE	INDEPENDENT CONTRACTOR
Performs services for only one firm at a time, on a non project basis.	Has numerous concurrent clients is not financially dependent on any one.

18. Making Service Available to General Public

The fact that a worker makes his or her services available to the general public lends itself to independent contractor status.

EMPLOYEE	INDEPENDENT CONTRACTOR
Services are not offered to general public, points toward control.	Offers services to public.

19. Right to Discharge

An employer exercises control through the threat of dismissal, which to some degree can cause the worker to comply with the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as he or she produces a result that meets the contract specifications.

EMPLOYEE	INDEPENDENT CONTRACTOR
Can be discharged at any time with no liquidated damages.	Cannot be discharged other than for failure to perform contracted service.

20. Right to Terminate

If the worker has the right to end his or her relationship with the service recipient at will and not incur a liability, that factor indicates an employer-employee relationship.

EMPLOYEE	INDEPENDENT CONTRACTOR
May terminate relationship at any time.	May terminate his or her relationship Only upon completion of contract or breach by other party.

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Worker Status and Immigration Law

The federal Immigration Reform and Control Act (IRCA) requires that all employers with 3 or more employees verify that their employers hired after November 1, 1986 are legally entitled to be employed in the United States. This requirement applies to "employees", not to "independent contractors".

Regulations issued by the Immigration and Naturalization Service (INS), located in the Code of Federal Regulations at 8 CFR Sect. 274a.1(j), provide 8 factors to be considered by the INS in determining independent contractor status:

Factors include, but are not limited to whether the individual or entity: (See 8 C.F.R. 274a.1(j))

1. supplies the tools or materials
2. makes services available to the general public
3. works for a number of clients at the same time
4. has an opportunity for profit or loss as a result of labor or services provided
5. invests in the facilities for work
6. directs the order or sequence in which the work is to be done
7. determines the hours during which the work is to be done.

Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself (emphasis added) is determined on a case-by-case basis.

