

## IRS 20 Factor Test – Independent Contractor or Employee?

The IRS test often is termed the “right-to-control test” because each factor is designed to evaluate who controls how work is performed. Under IRS rules and common-law doctrine, independent contractors control the manner and means by which contracted services, products, or results are achieved. The more control a company exercises over how, when, where, and by whom work is performed, the more likely the workers are employees, not independent contractors.

A worker does not have to meet all 20 criteria to qualify as an employee or independent contractor, and no single factor is decisive in determining a worker's status. The individual circumstances of each case determine the weight IRS assigns different factors.

NOTE: Employers uncertain about how to classify a worker can request an IRS determination by filing Form SS-8, “Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding.” However, some tax specialists caution that IRS usually classifies workers as employees whenever their status is not clear-cut. In addition, employers that request an IRS determination lose certain protections against liability for misclassification.

The 20 factors used to evaluate right to control and the validity of independent contractor classifications include:

- **Level of instruction.** If the company directs when, where, and how work is done, this control indicates a possible employment relationship.
- **Amount of training.** Requesting workers to undergo company-provided training suggests an employment relationship since the company is directing the methods by which work is accomplished.
- **Degree of business integration.** Workers whose services are integrated into business operations or significantly affect business success are likely to be considered employees.
- **Extent of personal services.** Companies that insist on a particular person performing the work assert a degree of control that suggests an employment relationship. In contrast, independent contractors typically are free to assign work to anyone.
- **Control of assistants.** If a company hires, supervises, and pays a worker's assistants, this control indicates a possible employment relationship. If the worker retains control over hiring, supervising, and paying helpers, this arrangement suggests an independent contractor relationship.
- **Continuity of relationship.** A continuous relationship between a company and a worker indicates a possible employment relationship. However, an independent

contractor arrangement can involve an ongoing relationship for multiple, sequential projects.

- **Flexibility of schedule.** People whose hours or days of work are dictated by a company are apt to qualify as its employees.

- **Demands for full-time work.** Full-time work gives a company control over most of a person's time, which supports a finding of an employment relationship.

- **Need for on-site services.** Requiring someone to work on company premises—particularly if the work can be performed elsewhere—indicates a possible employment relationship.

- **Sequence of work.** If a company requires work to be performed in specific order or sequence, this control suggests an employment relationship.

- **Requirements for reports.** If a worker regularly must provide written or oral reports on the status of a project, this arrangement indicates a possible employment relationship.

- **Method of payment.** Hourly, weekly, or monthly pay schedules are characteristic of employment relationships, unless the payments simply are a convenient way of distributing a lump-sum fee. Payment on commission or project completion is more characteristic of independent contractor relationships.

- **Payment of business or travel expenses.** Independent contractors typically bear the cost of travel or business expenses, and most contractors set their fees high enough to cover these costs. Direct reimbursement of travel and other business costs by a company suggests an employment relationship.

- **Provision of tools and materials.** Workers who perform most of their work using company-provided equipment, tools, and materials are more likely to be considered employees. Work largely done using independently obtained supplies or tools supports an independent contractor finding.

- **Investment in facilities.** Independent contractors typically invest in and maintain their own work facilities. In contrast, most employees rely on their employer to provide work facilities.

- **Realization of profit or loss.** Workers who receive predetermined earnings and have little chance to realize significant profit or loss through their work generally are employees.

- **Work for multiple companies.** People who simultaneously provide services for several unrelated companies are likely to qualify as independent contractors.

- **Availability to public.** If a worker regularly makes services available to the general public, this supports an independent contractor determination.
- **Control over discharge.** A company's unilateral right to discharge a worker suggests an employment relationship. In contrast, a company's ability to terminate independent contractor relationships generally depends on contract terms.
- **Right of termination.** Most employees unilaterally can terminate their work for a company without liability. Independent contractors cannot terminate services without liability, except as allowed under their contracts.

### **Are Independent Contractors Employees?**

Because FLSA applies only to employer-employee relationships, independent contractors are not covered. Court decisions interpreting FLSA coverage rules require that employers use an economic reality test in determining whether an employment relationship exists with respect to a given worker.

Similar to the common law test, the economic reality test focuses on the degree of control exercised by the employer as an essential factor in determining whether an employer-employee relationship exists. While no single factor is controlling or decisive in determining whether an employment relationship exists, the facts and circumstances that courts and federal enforcement officials examine in deciding whether an individual is an employee or an independent contractor are:

- the degree to which the employer controls or directs the manner in which work is performed,
- whether the worker's opportunity for profit or loss depends on his or her managerial skills,
- whether the worker's duties are performed for the employer on an ongoing or permanent basis,
- whether the service performed by the worker is an integral part of the employer's business,
- the extent of the worker's investment in equipment or materials needed to perform the job, and
- the degree to which the worker is engaged primarily for the benefit of the employer.

The IRS considers a worker to be your employee if you have the right to control not only what work will be done, but also how the worker will do it. If you treat a worker as an independent contractor, but the IRS decides you have sufficient control over the worker