



Independent Contractors vs. Employees

There is no clear cut, simple rule to help an employer determine whether an individual is an independent contractor or an employee. Rather, the relationship as a whole must be evaluated. However, there are certain factors that may be considered and when looked at as a whole, the decision becomes clearer. If still in doubt, the IRS will help you decide before it becomes a problem.

Before you can determine how to treat payments you make for services, you must first know the business relationship that exists between you and the person performing the services. The person performing the services may be an independent contractor or an employee. In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered. It is critical that you, the employer, correctly determine whether the individuals providing services are employees or independent contractors. Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any



taxes on payments to independent contractors. If you incorrectly classify an employee as an independent contractor, you can be held liable for employment taxes for that worker, plus a penalty.

• *Who is an Independent Contractor?*

A general rule is that you, the payer, have the right to control or direct only the result of the work done by an independent contractor, and not the means and methods of accomplishing the result.

• *Who is an Employee?*

Under common-law rules, anyone who performs services for you is your employee if you can control what will be done and how it will be done. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed. To determine whether an individual is an employee or independent contractor under the common law, the relationship of the worker and the business must be examined. All evidence of control and independence must be considered. In an employee-independent contractor determination, all information that provides evidence of the degree of control and degree of independence must be considered. Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties.

Acceptable documents list differs from I-9 Form.

The I-9 Form contained on the United States Citizenship and Immigration Services website is the latest printed version. The USCIS explains that form changes cannot be made as quickly on the printed forms as they can on the website. Therefore, they provide notice of changes through their site to assist you with the latest information. While you may use the form provided on the website, you must be sure to follow any special instructions listed on that page.

Currently, the changes that are not reflected on the form, but which must be followed, are:

- Form I-766 (Employment Authorization Document), although not listed on the 1991 version of the I-9, is an acceptable List A document #10.
- Form I-151, is no longer an acceptable document. However, Form I-551 remains an acceptable document (List A #5).

The following documents have been removed from the list of acceptable identity documents:

- Certificate of U.S. Citizenship (List A #2).
- Certificate of Naturalization (List A #3).
- Unexpired Reentry Permit (List A #8).
- Unexpired Refugee Travel Document (List A #9).

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Behavioral Control covers facts that show whether the business has a right to direct and control how the work is done through instructions, training, or other means.

Financial Control covers facts that show whether the business has a right to control the financial and business aspects of the worker's job. This includes:

- The extent to which the worker has unreimbursed business expenses,
- The extent of the worker's investment in the facilities used in performing services,
- The extent to which the worker makes his or her services available to the relevant market,
- How the business pays the worker, and
- The extent to which the worker can realize a profit or incur a loss.

Type of Relationship includes:

- Written contracts describing the relationship the parties intended to create,
- The extent to which the worker is available to perform services for other, similar businesses,
- Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay,

For more information on these or other Compliance Issues, contact Morton Risk Management at 720-488-4915.

I-9's Continued...

The employer must review and accept documents that reasonably appear to be genuine and to relate to the person presenting them (e.g., the name on the Social Security card should be compared to the name on the state driver's permit and the photo on the driver's permit compared to the appearance of the person who presented the documents).

Employers may reject documents if they do not reasonably appear to be genuine and ask employees who present questionable documentation for other documentation that satisfy the I-9 requirements. Employees who are unable to present acceptable documents should be terminated. Employers who choose to retain such employees may be subject to penalties for improper completion of the form or for "knowingly continuing to employ" unauthorized workers if such workers are in fact unauthorized.

- The permanency of the relationship, and
- The extent to which services performed by the worker are a key aspect of the regular business of the company.

For more information, refer to Publication 15-A, *Employer's Supplemental Tax Guide*.

If you want the IRS to determine whether a specific individual is an independent contractor or an employee, file Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*.

