

## Independent Contractor or Employee?

The tax rules in this area are a confusing patchwork of common-law rules, Code-based "statutory employee" and "statutory independent contractor" rules, and hundreds of cases and rulings that often turn on the particular facts and circumstances involved. As a result of this assortment of legislative definitions, rules and guidelines, employers often find themselves in the dark when it comes to applying the rules in everyday business practices.

There is no uniform definition of the term "employee" for purposes of the income tax rules.

*Under the common-law rules*, an individual generally is an employee if the enterprise he works for has the right to **control and direct him** regarding the job he is to do and how he is to do it. Otherwise, he is an independent contractor.

The IRS has listed twenty factors in Revenue Ruling 87-41 as an aid to determining whether an individual is an employee under the common law rules (*whether sufficient control is present to establish an employer-employee relationship*).

- 1. Instructions.** A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.
- 2. Training.** Training a worker by requiring an experienced employee to work with the worker indicates that the person or persons, for whom the services are performed, want the services performed in a particular method or manner.
- 3. Integration.** Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control.
- 4. Services rendered personally.** If the services must be rendered personally, presumably the person for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.
- 5. Hiring and supervision.** If the person for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job.
- 6. Continuing relationship.** This factor indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.
- 7. Set hours of work.** The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.
- 8. Full-time requirement.** If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work.

- 9. Doing work on employer's premises.** This factor suggests control over the worker, especially if the work could be done elsewhere.
- 10. Order of sequence of work performed.** This 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 or persons for whom the services are performed.
- 11. Oral or written reports.** A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.
- 12. Payment by the hour, week or month.** This factor generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job.
- 13. Payment of business and/or traveling expense.** An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.
- 14. Furnishing of tools and materials.** This factor tends to show the existence of an employer-employee relationship.
- 15. Significant investment.** Lack of investment in facilities (such as the maintenance of an office rented at fair value from an unrelated party) indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.
- 16. Direct interest in profitability of the work accomplished.** 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) is generally an independent contractor, but the worker who cannot is an employee.
- 17. 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.
- 18. Making services available to the general public.** The fact that a worker makes his or services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
- 19. Right to discharge worker.** This is a factor indicating that the worker is an employee and the person possessing the right is an employer.
- 20. Right to terminate the work relationship.** 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.