

Employee or Independent Contractor?

Even though the Internal Revenue no longer uses their 20-Factor Control Test¹ we still find it extremely helpful in determining whether a worker is an employee or independent contractor. Keep in mind that no single factor is decisive. Rather, the facts and circumstances surrounding **all** of them must be carefully considered when assessing the degree of control that exists in a given work arrangement.

When determining whether an individual is more appropriately classified as an employee or independent contractor, ask the following questions:

	Yes	No
1. Is the individual's work vital to the company's core business?	Employee activities are integrated with the organization's business operations.	IC services typically are limited to non-essential business activities.
2. Did the company train the individual to perform tasks in a specific way?	Employees usually are taught the specific work procedures that they are expected to follow and must comply with any other employer requirements with regard to these activities.	ICs generally are considered "experts" in their field and, as such, can determine which work methods are most appropriate. Additionally, they typically are held accountable only for outcomes, not the means with which they are achieved.
3. Do you (or can you) instruct the individual as to when, where, and how the work is performed?		
4. Do you (or can you) control the sequence or order of the work performed?		
5. Do you (or can you) set the hours of work for the individual?	Employees generally work on a schedule determined by their employer.	ICs can work whatever hours they choose, provided that agreed-upon deadlines are met.
6. Do you (or can you) require the individual to perform the work personally?	Employees must do the tasks for which they were hired themselves.	ICs are free to delegate to their own staff or subcontract the work to others.
7. Do you (or can you) prohibit the individual from hiring, supervising, and paying assistants?		
8. Does the individual perform regular and continuous services for you?	Employees typically have an open-ended relationship with a company, even if the work is performed at irregular intervals.	ICs work on a project-by-project basis, each time with a new contract.

	Yes	No
9. Does the individual provide services on a substantially full-time basis to your company?	Employees usually are expected to devote all working hours to their employer.	ICs do not spend so much time with any one company that they are restricted from doing projects for others and, in fact, generally work for multiple clients concurrently.
10. Is the company the sole or major source of income for the individual?		
11. Is the work performed on your premises?	Employees ordinarily are required to work on-site.	ICs are free to work off-site, such as in a home office.
12. Do you (or can you) require the individual to submit regular reports, either written or oral?	Employees may be asked to provide status or activity reports on a regular basis.	ICs are responsible for producing a final deliverable and are not, therefore, required to provide interim reports.
13. Does the company pay the individual by the hour, week, or month?	Employees usually are paid at fixed intervals.	ICs generally are paid for their results, not the amount of time worked.
14. Does the company pay the individual's travel and business expenses?	Employees who incur work-related expenses typically are reimbursed by their employer.	ICs usually are expected to incorporate out-of-pocket expenses into their project fee rather than be directly reimbursed for them.
15. Are tools or equipment furnished for the individual?	Employees generally use company-provided supplies.	ICs are expected to own and use their own supplies.
16. Does the individual have a significant investment in facilities, tools or equipment?	Employees typically use their company's facilities, tools and equipment.	ICs incur expenses related to work space, equipment, etc., like any other business owner.
17. Can the individual realize a profit or loss from his or her services to the company?	Employees usually can expect steady paychecks	ICs run the risk of non-payment if a project is not completed according to the specifications detailed in the contract.
18. Does the individual make his or her services available to the general public?	Employees typically do not position and market themselves as service providers.	ICs publicize their services to a wide range of potential clients via direct mail, advertising, etc.
19. Can the individual terminate the relationship without liability?	Employees can quit at any time and can typically be released "at will" by their employers.	ICs legally are obligated to complete projects according to contract provisions and can be dismissed only if they fail to do so.
20. Does the company have the right to discharge the individual at any time?		

To streamline this analysis, the Internal Revenue Service used these factors to develop what is known as the three “categories of evidence” – behavioral, financial and type of relationship. While intended to assist workers in determining their own appropriate classification, employers may find IRS **Publication 1779** to be a useful reference in understanding these criteria. **Publication 15-A** is also quite valuable, especially in that it provides scenarios from a variety of industries.

The courts have considered many facts in deciding whether a worker is an independent contractor or an employee. These facts fall into three main categories:

- **Behavioral Control** – Facts that show whether the business has a right to direct and control. These include:
 - Instructions - an employee is generally told:
 1. when, where, and how to work
 2. what tools or equipment to use
 3. what workers to hire or to assist with the work
 4. where to purchase supplies and services
 5. what work must be performed by a specified individual
 6. what order or sequence to follow
 - Training – an employee may be trained to perform services in a particular manner.
- **Financial Control** – Facts that show whether the business has a right to control the business aspects of the worker’s job include:
 - The extent to which the worker has unreimbursed expenses
 - The extent of the worker’s investment
 - The extent to which the worker makes services available to the relevant market
 - How the business pays the worker
 - The extent to which the worker can realize a profit or loss
- **Type of Relationship** – Facts that show the type of relationship include:
 - Written contracts describing the relationship the parties intended to create
 - Whether the worker is provided with employee-type benefits
 - The permanency of the relationship

¹ This information was taken from the IRS and SHRM websites by Carol Rovello, Strategic Workplace Solutions LLC. It does not substitute for professional advice. For assistance, contact carol@strategic-workplace-solution.com.