

Employer - Employee Relationships

Introduction:

Tax Compliance issues:

- Employees generally report all of their wage income.
 - Statistics indicate that independent contractors do not report all of their income
 - Workers who are employees but are reported as independent contractors often have an even lower rate of reporting income than workers who are correctly treated as independent contractors
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Objectives:

1. Properly determine if a worker is an independent contractor or a common law employee for federal employment tax purposes.
 2. Identify other employment situations
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Definition of an employee per Internal Revenue Code:

IRC § 3121(d) EMPLOYEE. For the purpose of this chapter, the term employee means --

- (1) any officer of a corporation; or
- (2) any individual who, **under the common law rules** applicable in determining the employer-employee relationship has the status of an employee; or
- (3) any individual who performs services for remuneration for any person -- as
 - (A) Certain agent/commission drivers
 - (B) Full-time life insurance sales persons
 - (C) Home workers
 - (D) Traveling or city salesperson.
- (4) any individual who performs services that are included under an agreement entered into pursuant to section 218 of the Social Security Act.

Employer - Employee Relationships

Common Law Employee: Control Standard

Common Law Standard

The common law, a major part of the justice system in the United States, flows chiefly from court decisions. Under the common law, the treatment of a worker as an employee or independent contractor originates from the legal definitions developed in the law of agency -- whether one party, the principal, is legally responsible for the acts or omissions of another party, the agent -- and depends on the principal's right to direct and control the agent.

The Right to Control and Direct

Following the common law standard, the employment tax regulations provide:

Treas. Reg. 31.3121(d)-1(c) Common Law Employees.

(1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally, such relationship exists when the person for whom services are performed has **the right** to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.

It is not necessary that the employer direct or control the manner in which the services are performed; it is sufficient if the employer has the **right** to do so.

Legal Test

The legal test is whether there is a **right** to direct and control the means and details of the work. To determine whether the control test is satisfied in a particular case, the facts and circumstances must be analyzed.

Over the years, the IRS and Social Security Administration compiled a list of 20 factors used in court decisions to determine workers status. These 20 factors were eventually published in Rev. Rul. 87-41, 1987-1 C.B. 296, and are sometimes called the Twenty Factor Test.

This Twenty Factor Test is an analytical tool and **NOT** the legal control test used for determining worker status.

Employer - Employee Relationships

For Informational purposes: The Twenty Common Law Factors (RevRul 87-41)

- | | |
|---------------------------------|--------------------------------------|
| 1. Instruction | 11. Reports, Oral or Written |
| 2. Training | 12. Payment Type |
| 3. Integration | 13. Reimbursed Expenses |
| 4. Services Rendered Personally | 14. Tools and Materials |
| 5. Hiring Assistants | 15. Investment |
| 6. Continuing Relationship | 16. Profit or Loss |
| 7. Set Hours of Work | 17. Works for More than One Firm |
| 8. Full Time Required | 18. Offer Services to General Public |
| 9. Work Done on Premises | 19. Right to Fire |
| 10. Order or Sequence Set | 20. Right to Quit |

Control facts change over time

1. The twenty common law factors are not the only ones that may be important.
2. The relative importance and weight of the twenty common law factors can vary significantly.
3. The information important in helping determine worker status may change over time because business relationships change over time.
4. Some of the twenty common law factors are no longer as relevant as they once were.

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Developing the facts and weighing the evidence.

1. Look at the entire relationship.
 - The relationship often has several facets; some indicating the agency has control, while others indicate its' absence.
2. Control is a matter of degree and is rarely absolute.
 - Even in the clearest case of an independent contractor, the worker is constrained in some way. Conversely, employees may have autonomy/independence in some areas.
3. Need to consider the facts that support autonomy and the right to control.
 - The absence of a fact that would indicate control may be as important as its presence.

Important preliminary points

1. There is no "magic number" of relevant evidentiary facts.
2. Whatever the number of facts, they should be used in evaluating the extent of the right to direct and control or autonomy.
3. **ALL** relevant information needs to be explored and weighed before answering the legal question of whether the right to direct and control associated with an employer-employee relationship exists.
4. The evidence that gathered **must** be factual and well documented.

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Categories of Evidence (Publication 1779):

The following information reflects the primary categories of evidence and includes **examples** of key facts that illustrate the right to direct and control -- or its absence.

Behavioral Control

Facts which illustrate whether there is a right to direct or control how the worker performs the specific task for which he or she is hired:

Elements

- instruction
- training

Financial Control

Facts which illustrate whether there is a right to direct or control how the business aspects of the worker's activities are conducted:

- significant investment
- unreimbursed expenses
- services available to the public
- opportunity for profit or loss

Relationship of Parties

Facts which illustrate how the parties perceive their relationship:

- intent of parties/written contracts
- incorporation
- employee benefits
- discharge/termination
- length of relationship
- regular business activity

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BEHAVIORAL CONTROL

Instructions

The goal is to determine whether the business has retained the right to control the details of a worker's performance or instead has given up its right to control those details. Accordingly, the weight of "instructions" in any case depends on the degree to which instructions apply to **how the job gets done** rather than to the **end result**.

Types of instructions

1. when to do the work
2. where to do the work
3. what tools or equipment to use
4. what workers to hire to assist with the work
5. where to purchase supplies or services
6. what work must be performed by a specified individual (including ability to hire assistants)
7. what routines or patterns must be used
8. what order or sequence to follow

Prior approval

The requirement that a worker obtain approval before taking certain actions is an example of instructions.

EXAMPLE 1

L was hired by an agency X to maintain its vehicles. According to X, L's responsibilities are:

- **to ensure the vehicles are repaired;**
- **to ensure that the proper parts are ordered and received; and**
- **to ensure the parts are safely installed in accordance to the manufacturer's specifications.**

While developing the facts listed above, you discover that X requires L to secure prior approval:

- **to commence the repair work;**
- **to purchase the necessary parts; and**
- **to have the completed work examined prior to releasing the vehicle.**

X's requirement that L secure prior approval is evidence of control over L's behavior in the performance of L's services.

Prior approval - continued

Employer - Employee Relationships

EXAMPLE 2

L was hired by an agency X to maintain its vehicles. According to X, L's responsibilities are:

- to ensure the vehicles are repaired;
- to ensure that the proper parts are ordered and received; and
- to ensure the parts are safely installed in accordance to the manufacturer's specifications.

While developing the facts listed above, you discover that X does not require L to secure prior approval:

- to commence the repair work;
- to purchase the necessary parts; and
- to have the completed work examined prior to releasing the vehicle.

Rather, X allows L to take whatever actions L deems necessary, in L's discretion, to achieve the goals listed as L's responsibility. The absence of detailed instructions as to how L will perform the job function is evidence of L's autonomy in work performance.

Degree of Instruction

The degree of instruction depends on:

1. the scope of instructions,
2. the extent to which the business retains the right to control the worker's compliance with the instructions, and
3. the effect on the worker in the event of noncompliance.

All these provide useful clues for identifying whether the business keeps control over the manner and means of work performance (leaning toward employee status), or only over a particular product or service (leaning toward independent contractor status).

EXAMPLE 3

J is an independent delivery service. J receives a call for a pick-up from a government agency to make a delivery to a local sub-agency to which J agrees. Upon arrival at the agency's warehouse, J is given an address of where the cargo is to be delivered and advised to make the delivery before close of business that day. This is a direction of WHAT is to be done rather than how it is to be accomplished and is consistent with independent contractor status.

~~Degree of Instruction continued~~

Employer - Employee Relationships

EXAMPLE 4

T is also a deliveryman but delivers for a local agency. T reports to the agency's warehouse every morning. The warehouse supervisor tells T what deliveries are to be made, how to load the cargo in the truck, what route to take, and the order in which the various elements of the cargo are to be delivered. This is an instruction on HOW the work is to be performed and is consistent with employee status.

Other issues regarding instructions:

- Presence of instructions or rules mandated by governmental agencies or industry governing bodies
- Instructions by customer
- Suggestions vs. Instructions
- Business identification as instructions
- Nature of occupation for instructions
- Nature of work for instructions
- Evaluation Systems

Training

Periodic or on-going training provided by a business about procedures to be followed and methods to be used indicates that the business wants the services performed in a particular manner -- strong evidence of an employer-employee relationship.

Not all training rises to this level. The following types of training, which might be provided to either independent contractors or employees, should be disregarded:

1. Orientation or information sessions about the business's policies, new product line, or applicable statutes or government regulations.
 2. Programs that are voluntary and are attended by a worker without compensation.
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FINANCIAL CONTROL

Right to control the economic aspects of relationship

The items that usually need to be explored are:

1. significant investment
2. unreimbursed expenses
3. services available to the relevant market
4. method of payment
5. opportunity for profit or loss

Economic dependence

The question is not whether the worker is economically dependent on or independent of the business for which services are performed. This analysis has been rejected by congress and the Supreme Court as a basis for determining worker classification.

Significant investment

1. A significant investment is evidence that an independent contractor relationship **MAY** exist.
2. A significant investment is **NOT** necessary for independent contractor status.
3. No dollar limitation on investment but the investment must have substance.

EXAMPLE 5

C is a computer programmer for the Department of Nirvana -- State of Utopia. Nirvana treats C as an independent contractor. After attending a presentation given by the IRS, Nirvana decides that in order to meet the significant investment rule that it would lease the computer to C. Nirvana claims that C has a significant investment in the \$ 25,000 computer that C uses. Further investigation finds that C leases the computer at less than fair rental value and can turn it in at any time without liability for further payments. Nirvana pays for liability insurance and regular maintenance on the computer. C has expenses for the computer rental but, based on these facts, evidence of a significant investment has not been established.

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Business expenses

A worker choosing to incur expenses and bear their costs impacts the worker's opportunity for profit or loss.

These MAY include:

rent and utilities	postage and delivery
tools and equipment	repairs and maintenance
training	supplies
advertising	travel
payments to business managers and agents	leasing of equipment
	depreciation
wages or salaries of assistants	inventory/cost of goods sold
	insurance
licensing, certification, professional dues	

Expenses -- Reimbursed v. Unreimbursed

1. Businesses often pay business or travel expenses for their employees.
2. Independent contractors' expenses may also be reimbursed.
3. Focus on UNREIMBURSED expenses, which better distinguish independent contractors and employees, inasmuch as independent contractors are more likely to have unreimbursed expenses.
4. If expenses are unreimbursed, then the opportunity for profit or loss exists.
5. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important.

Services available

1. An independent contractor is generally free to seek out business opportunities.
2. Independent contractors often advertise, maintain a visible business location, and are available to work for the relevant market.
3. The absence of these activities is a neutral fact.

Employer - Employee Relationships

Services available - continued

EXAMPLE 6

Agency U engaged C to perform landscaping services on its grounds. Such services consist of weekly lawn mowing and the annual trimming of hedges. C advertises these services in the Yellow Pages. The fact that C advertises would indicate that C is available to perform services for the relevant market. Consider, however, that C negotiates a long-term contract with Agency U to maintain all of Agency U's locations. C decides not to continue advertising, yet C is still available to perform services for the relevant market.

Method of payment

The method of payment may be helpful in determining whether the worker has the opportunity for profit or loss.

Salary or hourly wage

1. A worker who is compensated on an hourly, daily, weekly, or similar basis is guaranteed a return for labor.
2. This is generally evidence of an employer-employee relationship, even when the wage or salary is accompanied by a commission.
3. In some lines of business, such as law, it is typical to pay independent contractors on an hourly basis.

Flat fee

1. Performance of a task for a flat fee is generally evidence of an independent contractor relationship, especially if the worker incurs the expenses of performing the services.
2. When payments are made (daily, weekly, or monthly) is not relevant.

Commissions

1. A commission-based worker may be either an independent contractor or employee.
2. The worker's status may depend on the worker's ability to realize a profit or incur a loss as a result of services rendered.

Employer - Employee Relationships

Realization of profit and loss

1. The ability to realize a profit or incur a loss is probably the strongest evidence that a worker controls the business aspects of services rendered.
 2. The facts already considered -- significant investment, unreimbursed expenses, making services available, and method of payment -- are all relevant in this regard.
 3. Should also consider whether the worker is free to make business decisions which affect the worker's profit or loss.
 4. It is sometimes asserted that because a worker can receive more money by working longer hours or receive less money by working less, the worker has the ability to incur a profit or loss. This type of income variation, however, is also consistent with employee status and does not distinguish employees from independent contractors.
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RELATIONSHIP OF THE PARTIES

Relationship of business and worker

1. Most of the factors in this category reflect how the worker and the business perceive their relationship to each other.
2. It is much harder to link the facts in this category directly to the right to direct and control **HOW** work is to be performed.
3. The relationship of the parties is important because it reflects the parties' **INTENT** concerning control.

Intent of parties/written contract

1. A written agreement describing the worker as an independent contractor is viewed as evidence of the parties' intent that a worker is an independent contractor.
2. A contractual designation, in and of itself, is not sufficient evidence.
3. The facts and circumstances under which a worker performs services are determinative of the worker's status.
4. The **substance** of the relationship, **not the label**, governs the worker's status.
5. In close cases, the **intent** of the parties, as reflected in the contractual designation, is an effective way to resolve the issue.

Employer - Employee Relationships

Incorporation

1. The corporate form is generally recognized for both state law and federal law, including federal tax purposes, if:
 - corporate formalities are properly followed, and
 - at least one non-tax business purpose exists.
2. Disregarding the corporate entity is generally an extraordinary remedy, applied by most courts only in cases of clear abuse.
3. The fact that a worker receives payment for services through the worker's corporation does not automatically require a finding of independent contractor status with respect to those services.

Employee benefits

1. Providing a worker with employee benefits traditionally associated with employee status has been an important fact in several recent court decisions.
2. If a worker is excluded from a benefit plan because the worker is not considered an employee by the business, this is relevant (though not conclusive) in determining the worker's status as an independent contractor.
3. If the worker is excluded on some other grounds, the exclusion is irrelevant in determining whether the worker is an independent contractor or an employee.

Discharge/termination -- traditional analysis

1. A business's ability to terminate the work relationship at will, without penalty, provided a highly effective method to control the details of how work was performed.
2. A worker's ability to terminate work at will was traditionally considered to illustrate that the worker merely provided labor and tended to indicate an employer-employee relationship.
3. Conversely, in the traditional independent contractor relationship, the business could terminate the relationship only if the worker failed to provide the intended product or service, thus indicating the parties' intent that the business did not have the right to control how the work was performed.
4. If the Independent contractor terminated work, the business could refuse payment or sue for nonperformance. This indicated the business's interest in receipt of the product or service for which the parties had contracted and tended to indicate an independent contractor relationship.

Employer - Employee Relationships

Discharge/termination (continued)

Limits on ability to discharge worker

In reality, businesses rarely have complete flexibility in discharging an employee. The business may be liable for pay in lieu of notice, severance pay, "golden parachutes," or other forms of compensation when it discharges an employee.

The reasons for which a business can terminate an employee may be limited -- whether by law, by contract, or by its own practices. The inability to freely discharge a worker, by itself, no longer constitutes persuasive evidence that the worker is an independent contractor.

Limits on worker's ability to quit -- non-performance by an employee

Businesses may successfully sue employees for substantial damages resulting from their failure to perform the services for which they were engaged. As a result, the presence or absence of limits on a worker's ability to terminate the relationship, by themselves, no longer constitutes useful evidence in determining worker status.

On the other hand, a business's ability to refuse payment for unsatisfactory work continues to be characteristic of an independent contractor relationship.

Termination of Contracts

Independent contractors may enter into short-term contracts for which nonperformance remedies are inappropriate or may negotiate limits on their liability for nonperformance. Professionals, such as doctors and attorneys, are typically able to terminate their contractual relationship without penalty.

Discharge/termination -- limited usefulness

Because the significance of facts bearing on the right to discharge/terminate is so often unclear and depends primarily on contract and labor law, this type of evidence should be used with great caution.

Employer - Employee Relationships

Length of Relationship

Permanency

Courts have considered the existence of a permanent relationship between the worker and the business as relevant evidence in determining whether there is an employer-employee relationship.

Indefinite relationship

1. If a business engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence of their intent to create an employment relationship.
2. An indefinite relationship should not be confused with a long-term relationship.

Long-term relationship

1. A long-term relationship may exist between a business and either an independent contractor or an employee.
2. The relationship between the business and an independent contractor may be long-term for several reasons:
 - the contract may be a long-term contract
 - contracts may be renewed regularly due to superior service, competitive costs, or lack of alternative service providers
3. A business may also have a relationship with an employee that is long-term, but not indefinite.
4. A relationship that is long-term, but not indefinite, is a neutral fact that should be disregarded.

Temporary relationship

A temporary relationship is also a neutral fact that should be disregarded. An independent contractor will typically have a temporary relationship with a business, but so too will employees engaged on a seasonal, project, or "as needed" basis.

Regular business activity

1. The courts have looked at the services performed by the worker and the extent to which those services are a key aspect of the regular business of the company.
2. Remember that the mere fact that a service is desirable, necessary, or even essential to a business does not mean that the service provider is an employee.

Employer - Employee Relationships

3. It is possible that the work performed is part of the principal business of the firm, yet it has hired workers who are outside specialists and may be independent contractors.

FACTORS OF LESSER IMPORTANCE

Part-time or full-time work

1. Performing services on a part-time basis or working for more than one person or business was once thought to be significant evidence indicating that the worker was an independent contractor.
2. In today's economy, whether a worker performs services on a full-time or part-time basis is a neutral fact.
3. There are several reasons for this change.
 - With cutbacks and downsizing in business and industry, many companies hire workers on a part-time basis.
 - These workers may be either independent contractors or employees.
 - Working full-time for one business is also consistent with either independent contractor or employee status.
 - Many employees "moonlight" by working for a second employer. As a result, whether services are performed for one business is no longer useful evidence.

Place of work

Whether work is performed on the business's premises or at a location selected by the business often has no bearing on worker status.

Even when it is relevant evidence, it will be relevant because it illustrates the business's right to direct and control how the work is performed and will have been considered in connection with instructions.

One location

1. In many cases, services can be provided at only one location.
2. This requirement may be inherent in the result to be achieved and are not evidence of the right to direct and control how the work is performed.

Different locations

1. In today's world, off-site work is consistent with either an independent contractor or employer-employee relationship.
2. The place where work is performed is most likely to be relevant evidence in cases in which the worker has an office or other business location, which would have been considered in evaluating significant investment, unreimbursed expenses, and opportunity for profit or loss.

Employer - Employee Relationships

Hours of work

1. If relevant, has already been considered in connection with instructions.
 2. Some work must, by its nature, be performed at a specific time. This relates to the result to be achieved, not how the work is performed.
 3. Flexible hours are consistent with either independent contractor or employee status.
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WEIGHING THE EVIDENCE

Control and autonomy both present

1. Some facts will support independent contractor status and other facts will support employee status.
2. This is because independent contractors are rarely totally unconstrained in the performance of their contracts, while employees almost always have some degree of autonomy.

Which predominates?

You will need to weigh the evidence in order to determine whether, looking at the relationship as a whole, evidence of control or autonomy predominates.

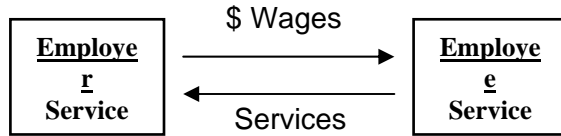
EXAMPLE 7

Dr. B owns and operates Z medical center, which provides a variety of medical services. To better serve his patients, Dr. B purchased an x-ray machine and hired Dr. C to read the x-rays. Dr. C is a highly skilled and highly trained professional in the field of radiology. Even though Dr. B does not instruct Dr. C on how to take and read x-rays, other evidence, such as financial control or the contractual relationship of the parties, may indicate a right to direct and control Dr. C to an extent consistent with employee status. On the other hand, a lack of financial control by Dr. B over such details of Dr. C's radiology practice as fees, billings, and collections, may indicate Dr. C's autonomy to an extent consistent with independent contractor status, notwithstanding Dr. C's use of Dr. B's equipment. This is especially true if their contract evidences intent to create an independent contractor relationship.

Employer - Employee Relationships

Types of Employment Relationships

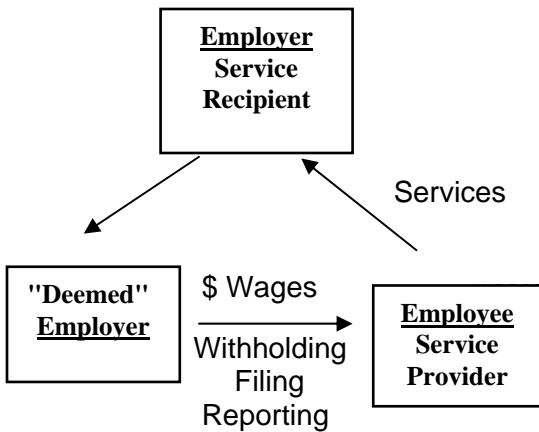
Two Party Relationships



Third Party Relationships

Deemed Employer

IRC § 3401(d)



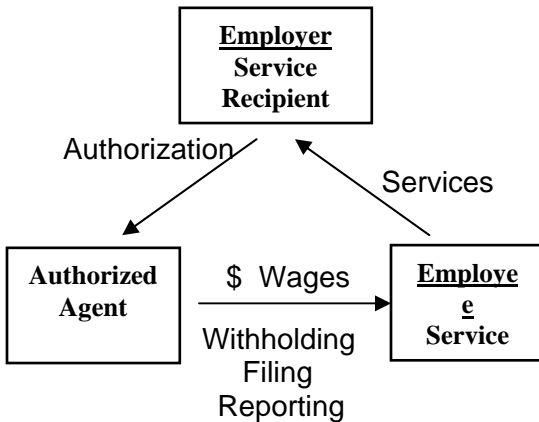
Deemed Employer - State Agency

Person having legal control of the payment of wages. Responsible for withholding, filing and reporting employment taxes.

Example: State agency that pays to childcare provider on behalf of welfare client to enable the client to work. Welfare client is the common law employer and the state agency is the "deemed" employer responsible for withholding and reporting employment taxes

Agent of Employer

IRC § 3504



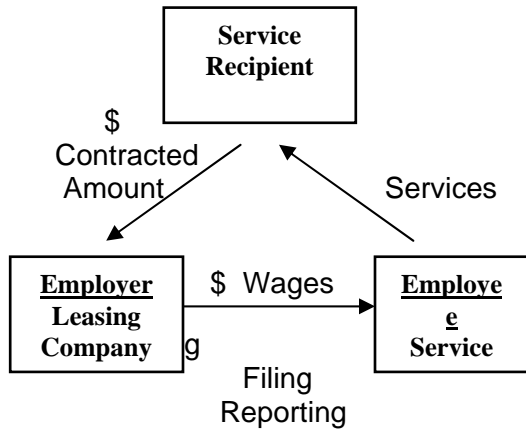
Agent of Employer - State Agency

Employer *voluntarily* authorizes agent, who controls or pays wages to employer's employees, to withhold, file and report. Employer remains liable at the same time. Employer and agent file authorization forms with IRS.

Example: State welfare agency pays caregiver to provide in-home domestic services for welfare recipient. The welfare recipient is the employer. The agency files request to be the agent for the welfare client. State agency pays, withholds, files and reports wages as an authorized agent of the employer.

Employee Leasing

Employer - Employee Relationships



Employee Leasing

Service recipient contracts with leasing company to provide workers. The leasing company is the employer and is responsible for paying, withholding, filing and reporting wages. The leasing company retains the right to control the worker.

Example:

Agency contracts with a leasing company to provide computer programmers to complete a project expected to last 18 months. The leasing company is the employer, withholding, filing and reporting all required employment taxes.

Caution: The agency leasing the employees is considered the employer for any taxable payments or reimbursements made directly to the leased employee.

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SUMMARY:

The service-recipient will always be the common-law employer and liable for the tax obligations associated with employment. The tax obligations may be extended by statute (IRC § 3401(d)) or by consent (IRC § 3504) under the premise that the withholding of the taxes is deducted at the source of the payment.

Employer - Employee Relationships

Consequences of Incorrect Treatment (Tax & Penalties):

	1099 filed	FICA	FITW	Wage	Tax
Full Rates:		15.30%	28.00% * x	\$30,000	\$12,990
3509(a) Rates	Yes	9.18%	1.50% x	\$30,000	\$3,204
3509(b) Rates	No	10.71%	3.00% x	\$30,000	\$4,113

* The supplemental income tax wage rate is 25% for 2006 and thereafter.

IRC § 3509 rates are comprised of the employer's portion of the FICA tax and a percentage of the employee's portion of FICA tax and FITW. The percentage of the employee's portion of FICA and FITW is dependent upon whether the Form 1099-MISC was filed with the IRS and furnished to the employee.

Summary

1. In determining a worker's status, you should gain an understanding of the way a business operates and the relationship between the business and the worker.
2. Areas to consider while developing the evidence are:
 - What the business does and how the job gets done.
 - The relationship between the business and its clients or customers.
 - Facts that indicate whether the business has the right to control HOW work is done.
3. Evidence that may be the most persuasive can be identified within three specific categories -- Behavioral control, Financial control and Relationship of the parties.
4. Behavioral control focuses on whether there is a right to direct or control HOW the work is done. The presence or absence of instructions and training on how work is to be done are especially relevant.
5. Financial control focuses on whether there is a right to direct or control how the BUSINESS aspects of the worker's activities are conducted. Significant investment, unreimbursed expenses, services available to the relevant market, method of payment, and opportunity for profit or loss is facts relevant to financial control.
6. Relationship of the parties focuses on how the parties perceive their relationship. intent of parties/written contract, employee benefits, discharge/termination, permanency, and regular business activity are relevant to how the parties perceive their relationship.
7. Relevant evidence in all three categories must be weighed to determine the worker's status.

Employer - Employee Relationships

REVENUE RULING 87-41, 1987-1 C.B. 296

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

2. **TRAINING.** Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. See Rev. Rul. 70-630, 1970-2 C.B. 229. 1955-2 C.B. 410.

3. **INTEGRATION.** Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. See *United States v. Silk*, 331 U.S. 704 (1947), 1947-2 C.B. 167.

4. **SERVICES RENDERED PERSONALLY.** If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

5. **HIRING, SUPERVISING, AND PAYING ASSISTANTS.** If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. Compare Rev. Rul. 63-115, 1963-1 C.B. 178, with Rev. Rul. 55-593, 1955-2 C.B. 610.

6. **CONTINUING RELATIONSHIP.** A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. See *United States v. Silk*.

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. See Rev. Rul. 73-591, 1973-2 C.B. 337.

8. **FULL TIME REQUIRED.** 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. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. See Rev. Rul. 56-694, 1956-2 C.B. 694.

Employer - Employee Relationships

REVENUE RULING 87-41, 1987-1 C.B. 296 (continued)

9. **DOING WORK ON EMPLOYER'S PREMISES.** If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694.
10. **ORDER OR SEQUENCE SET.** If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so. See Rev. Rul. 56-694.
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. See Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.
12. **PAYMENT BY HOUR, WEEK, MONTH.** Payment by the hour, week, or month 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. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor. See Rev. Rul. 74-389, 1974-2 C.B. 330.
13. **PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES.** If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.
14. **FURNISHING OF TOOLS AND MATERIALS.** The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

Employer - Employee Relationships

REVENUE RULING 87-41, 1987-1 C.B. 296 (continued)

15. **SIGNIFICANT INVESTMENT.** If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities 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. See Rev. Rul. 71-524. Special scrutiny is required with respect to certain types of facilities, such as home offices.

16. **REALIZATION OF PROFIT OR LOSS.** 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. See Rev. Rul. 70-309. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

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. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

18. **MAKING SERVICE AVAILABLE TO GENERAL PUBLIC.** The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship. See Rev. Rul. 56-660.

19. **RIGHT TO DISCHARGE.** The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. Rev. Rul. 75-41, 1975-1 C.B. 323.

20. **RIGHT TO TERMINATE.** 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. See Rev. Rul. 70-309.

Employer - Employee Relationships

IRS Contacts

IRS SS-8 unit:

Brookhaven Service Center
SS-8 Unit
1040 Waverly Avenue
Holtsville, NY 11742

IRS Information Returns (W-2, 1099) Assistance

Toll Free (866) 455-7438 (8:30 am - 4:30 pm Eastern Time)

E-mail: www.mccirp@irs.gov

IRS Forms Ordering - (800) 829-3676

Fax Ordering - (703) 368-9694

Forms Ordering (TDD) - (800) 829-4059

E-mail: www.irs.gov/formspubs

IRS Business and Specialty Tax Help Line

Toll free: (800) 829-4933

IRS Taxpayer Advocate - (877) 777-4778

Taxpayer Advocate (TDD) – (800) 829-4059

E-mail: www.irs.gov/advocate

(For assistance with long-standing tax issues)

IRS Foreign Tax Questions - (215) 516-2000

Office of Federal, State and Local Governments (FSLG)

E-mail: www.irs.gov/govt/fslg

TEGE Customer Account Services - (877) 829-5500 (for governmental entities only)

FSLG Specialist – Marilee Basaraba: Marilee.Basaraba@irs.gov

Internet

<http://www.fedworld.gov/>

Fedworld Information Network

(Good for searching, locating, ordering and acquiring government and business information)

Social Security Administration

E-mail: www.ssa.gov

General information - (800) 772-1213

Employer questions - (800) 772-6270

Employer information: www.ssa.gov/employer

Employee Verification Services: www.ssa.gov/employer/EVS

State and Local Government Employers: www.ssa.gov/slge

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