



NPDA

National Private Duty Association

The Voice of Private Duty Home Care

**Independent Contractor Versus Employee:
A Fundamental Legal Challenge When Providing
Home Care Services Using Independent Contractors**

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Executive Summary

In contrast to popular belief, a worker's status usually is not under the business' control. The question of whether a caregiver is an independent contractor or an employee must be answered correctly. Failure to answer that question correctly can affect not only a home care business but also its clients. An unaware home care consumer might decide on care based on cost alone, and that criteria might well be an uninformed choice with potential adverse consequences.

If a home care business improperly characterizes the workers it assigns to its clients as independent contractors when they actually are employees, it will fail to comply with applicable employment laws. This can lead to significant liability for the business and, in some instances, to the business's officer responsible for compliance. Furthermore, depending on the circumstances, liability could fall on the client or the client's family.

Unfortunately, many home care businesses are under the mistaken impression that simply calling someone an independent contractor makes them one. That is not correct. Whether or not someone is an independent contractor depends on all the facts and circumstances of each case and the purpose for which it is being determined.

There is no one test applicable to all situations and a contract cannot "make" someone an independent contractor when the facts show otherwise. It is quite possible for someone to not be an employee for one purpose, such as IRS, but be an employee for other purposes such as minimum wage and overtime pay or unemployment compensation.

This article identifies the common mistakes made in determining if a worker is an independent contractor or an employee. It then gives an overview of the considerations involved in determining if a worker is an independent contractor or an employee for various purposes.

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Independent Contractor Versus Employee: A Fundamental Legal Challenge When Providing Home Care Services Using Independent Contractors

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Whether someone is an independent contractor or an employee of a business must be answered correctly.

If the person is an employee, the business must comply with all the various laws applicable to the employment relationship, including:

- Withholding income taxes, Social Security and Medicare
- Paying the employer's share of Social Security and Medicare
- Paying federal and state unemployment contributions
- Meeting the requirements for minimum wage and overtime pay, and
- Complying with workers compensation laws,

to name only a few.

On the other hand, if the person is an independent contractor, the business has none of those responsibilities. For that reason, many businesses attempt to designate workers as independent contractors rather than as employees. Unfortunately for the business, however, the worker's status usually is not under the business' control.

Home care businesses that consider their workers to be independent contractors need to review the relationship they and their clients have with their workers to be sure that, in fact, the workers are independent contractors rather than employees. A worker's relationship to both the home care business and to the client must be examined. While it may be possible to structure an independent contractor relationship, for both legal and practical reasons, it is unlikely to be successful. Failure to properly classify their workers, places the financial viability of the home care business at risk.

Dispelling a Myth

At the outset, a myth needs to be dispelled.

Many businesses are under the mistaken assumption that, if they simply agree with a worker that the worker is an independent contractor, that agreement conclusively establishes him or her as an independent contractor rather than an employee. That is not correct.

A written contract with the worker stating the parties' intention that their relationship is that of principal-independent contractor rather than employer-employee is useful as evidence of their intention. It is not conclusive, however. It will not change a relationship that, in fact, is one of

employment rather than independent contractorship. Indeed, regulations of the Internal Revenue Service (“IRS”) expressly state:

“If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.” 26 C.F.R. §31.3401(c)-1(e)

It is fair to state that, if your business characterizes someone as an employee, the person probably is an employee. However, the reverse is not true—characterizing someone as an independent contractor does not make them one.

Whether or not a worker is an employee or an independent contractor depends on all the facts and circumstances of each case and the purpose for which it is being determined. There is no one test applicable to all situations and a written contract cannot “make” someone an independent contractor when the facts show otherwise.

As mentioned earlier, the responsibilities and obligations attached to being an employer can lead a business to attempt to structure its relationship with its workers as independent contractors rather than employees. Unfortunately for the business, this is typically done without a clear understanding of who is and who is not an independent contractor and without an understanding that a worker’s status can be different for different purposes. **The result is the business can be organized and operated on a flawed business model—treating workers as independent contractors when they really are employees—and this will not survive legal challenge.**

Employee or Independent Contractor?

If a business improperly characterizes the workers it assigns to its clients as independent contractors when they actually are employees, then it fails to comply with applicable employment laws which can lead to significant liability for the business and, in some instances, to the business’s officer responsible for compliance. Furthermore, in home care and depending on the circumstances, liability could fall on the client or the client’s family - something they are rarely aware of.

This article will provide an overview of the considerations involved in determining if a worker is an independent contractor or an employee for various purposes. It is not exhaustive as additional laws, other than those mentioned here, can become involved in the determination of a person’s employment status. Furthermore, the person’s status is very dependent on all the facts involved.

Common Mistakes

In considering whether a worker is an independent contractor or an employee, certain mistakes seem to be very common:

(1) Who Is the Employer?

Even though a worker may not be an employee of the business, it still must be remembered that does not mean the worker is an independent contractor. The worker actually may be an employee of the client or the client's family, thus requiring the client or client's family to comply with applicable employment laws.

(2) Believing Someone is an Independent Contractor Simply Because a Contract Says They Are.

A written contract cannot "make" someone an independent contractor. The contract may be evidence of the parties' intent but it is the facts of the relationship that control. If the facts show an employer-employee relationship, the contract will not overcome those facts.

(3) Only Thinking of IRS and Believing a Worker's Status for One Purpose is Conclusive for Other Purposes.

The need to withhold taxes and pay FICA and FUTA is obviously a major reason to determine if someone is an employee or an independent contractor. However, a common mistake is looking only at IRS rules and thinking that is the end of the issue and never considering the worker's status for other purposes.

IRS is only one of many purposes for which the worker's status must be determined. A business might determine that it does not have to withhold or pay employment taxes to IRS and then think that also means the worker is an independent contractor for other purposes as well.

This is incorrect for two reasons. First, the test for other purposes may be different than the test used for IRS purposes. Second, the worker may be an employee for IRS purposes, but the business is relieved from withholding due to certain exceptions that apply for IRS (see pages 6–8). Those exceptions apply **only** for IRS—not for other purposes.

Remember, it is very possible that a worker's status can be different depending on the purpose for which it is being determined.

(4) Thinking the IRS Safe Haven Rule Applies When It Does Not.

One exception from withholding for IRS purposes is a "Safe Haven" if a number of requirements are met (see pages 7–8). Businesses need to remember that they must be able to prove the existence of *each* of those Safe Haven requirements. Simply assuming the Safe Haven rule will offer protection does not mean that it will.

(5) Negating Status Because of the Terms of the Agreement.

As mentioned above, a written agreement cannot make someone an independent contractor when the facts show they are not. However, a written agreement can work to negate a person's independent contractor status if its provisions are inconsistent with the worker's status as an independent contractor.

(6) Treating Workers As Independent Contractors Only to Attempt to Avoid Legal Obligations.

If the only reason a business treats workers as independent contractors rather than as employees is to attempt to avoid withholding income taxes, making FICA and FUTA payments, or to keep the worker out of benefits, there is a good chance the workers are not independent contractors. This is because the independent contractor characterization probably is artificial and not reflective of the actual factual situation.

(7) Ignoring History.

If a business has a history of treating certain workers as employees and then simply changes to treating them as independent contractors without changing the facts of the relationship, it is doubtful they really are independent contractors. The history of treating them as employees is evidence of their true status.

(8) Lack of Consistency.

Consistency is important. If a business treats some workers as employees but treats substantially similar workers as independent contractors, it is unlikely the latter really are independent contractors. They may be, but it is unlikely. The fact that some are treated as employees is evidence of the true status of all the workers performing similar duties.

(9) Failure to Obtain Knowledgeable Legal Advice.

Whether or not a worker is an independent contractor or an employee requires a legal analysis of all the facts involved and of all the laws applicable to the purpose for which the worker's status is being determined. Unfortunately, businesses often simply assume someone is an independent contractor without obtaining legal advice from a knowledgeable employment lawyer. If a business has any question at all concerning the status of a worker, legal advice applicable to its situation should be obtained.

Determining a Worker's Status

The Common Law Test

The basic test used for many purposes to determine if someone is an independent contractor or an employee is what is known as the common law test. It is the test developed by the courts over many years.

Under the common law test, the basic question is whether or not your business has the right to control the details and means by which the work is performed rather than just the right to direct the ultimate result. That is, can your business control not only *what* is done but *how* it is to be done? If so, the worker is usually an employee. It is not necessary that your business actually control the worker's manner of performing his or her job. It is sufficient that your business has the *right* to do so.

In contrast, an independent contractor controls the methods and details of the task and is answerable to your business only as to results. Your business controls *what* is done but not *how* it is done.

In 1987, IRS identified 20 factors which evidence whether an employer-employee relationship or a principal-independent contractor relationship exists under the common law test. A list of those factors is included at the end of this article (see page 13). No one of those factors is controlling. Rather, the factors are simply indicia of the relationship involved. All of the factors must be considered to determine the actual relationship involved.

More recently, IRS set forth three broad categories under which IRS will evaluate the facts to determine whether workers are employees or independent contractors under the common law test. *IRS Publication No. 15-A Employers Supplemental Tax Guide*, pages 5-6 (rev. January 2004) They are:

(1) 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.

(2) 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

(3) 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
- How integral the services are to the principal activity

The grouping of the 20 factors into the three categories has been held to represent simply an organizational change in structure to provide clarity to the “employee-versus-independent contractor inquiry” rather than a substantive change in what is considered in the common law test. *Klausner v. Brockman*, 58 SW3d 671 (Mo.App W.D 2001)

The Test Is Different for Different Purposes

It is often overlooked that the test for independent contractor versus employee status can differ depending on the purpose for which it is being determined. While the tests may be similar for IRS, minimum wage and overtime pay, unemployment compensation, and other purposes, they very well are not identical.

A worker can be a business’ employee for one purpose but not for another purpose. For example, in *Secretary of Labor v. Superior Care, Inc.*, 105 LC ¶ 34,839, 1986 WL 32741 (E.D.N.Y. 1986), the court held the workers involved in that case could be independent contractors for purposes of New York’s unemployment compensation statute but still be employees for purposes of whether they were entitled to overtime pay under the federal Fair Labor Standards Act (“FLSA”).

A common mistake occurs when a business determines a worker is not an employee for purposes of IRS withholding (or that the business does not need to withhold for another reason) but then overlooks that the worker is an employee for another purpose such as overtime pay or unemployment compensation. The determination of a worker’s status is not simply an IRS issue; his or her status must be determined for many other purposes as well, and the answer can be different depending on the purpose involved.

The Tests for Different Purposes

Some of the purposes for which a worker’s status must be determined and the test used for that purpose are:

Internal Revenue Service.

Generally. For purposes of withholding federal income tax, a person performing services may be: (1) an independent contractor; (2) a common-law employee; (3) a “statutory employee”; or, (4) a “statutory non-employee”.

A “statutory employee” is one who is an employee for IRS purposes simply because the Internal Revenue Code says they are even though they may be independent contractors otherwise. However, the concept applies only to certain agent or commission drivers, full-time life insurance sales agents, industrial homeworkers, and full-time traveling or city salesmen, and, therefore, is not relevant for the typical home care business.

A “statutory non-employee” is one who is an employee but, for IRS purposes, is not treated as one simply because the Internal Revenue Code says they are not to be. However, the concept applies only to certain direct sellers and licensed real estate agents, and, therefore, once again, is not relevant for the typical home care business.

Whether a worker is an independent contractor or an employee is determined under the common law test. 26 C.F.R. §31.3401(c)-1. What IRS looks at in that regard is mentioned above in the discussion of the common law test.

However, even though a worker is an employee for purposes of income tax withholding, there are two concepts that may negate the need for a business to withhold income tax. One is a special provision for a “companion sitting placement service”. The other is a “Safe Haven” rule.

Special Provision for Companion Sitting Placement Services

The Internal Revenue Code provides that a “companion sitting placement service” will not be treated as the employer of its sitters and the sitters will not be treated as the employees of the placement service *if* the companion sitting placement service neither pays nor receives the salary or wages of the sitter. The placement service may be compensated on a fee basis by either the sitter or the individual for whom the sitting is performed. 26 USCA § 3506.

For this purpose, the term “companion sitting placement service” means an entity:

“...engaged in the trade or business of placing sitters with individuals who want the sitter’s services.” 26 C.F.R. §31.3506-1(a)(1)

“Sitters” means:

“...individuals who furnish personal attendance, companionship, or household care services to children or to individuals who are elderly or disabled.” 26 C.F.R. §31.3506-1(a)(2)

The IRS regulation expressly notes, however, that this rule only removes the sitter and companion sitting placement service from the employer-employee relationship when that relationship would otherwise exist between them. **If, under the common law test, the sitter would be considered to be an employee of the individual for whom the sitting is performed, rather than of the companion sitting placement service, this special rule has no effect upon that employer-employee relationship.** In other words, the rule can be used by the companion sitting placement service, but not by the individual for whom the services are provided.

Safe Haven

Section 530 of the Revenue Act of 1978 (commonly called “Safe Haven”) was passed by Congress to provide some protection for businesses employing persons the business considers to be independent contractors. In essence, it allows a business to treat a worker

as not being an employee for employment tax purposes regardless of the person's actual status under the common law test, unless that business has no reasonable basis for treating the person as an independent contractor.

There are a number of requirements that must be met for a business to rely upon Safe Haven protection as a defense to its actions. In essence, the business must have been consistent in its treatment of the worker as an independent contractor and have had a reasonable basis for doing so. The complete text of the IRS Safe Haven provision is included at the end of this article.

It is very important to remember that the Safe Haven provision provides relief only with regard to employment taxes for IRS. It has no application concerning the worker's status for other purposes.

Federal Insurance Contribution Act ("FICA")

FICA involves withholding for both Social Security and Medicare. The common law test applies the same for FICA as IRS discussed above. 26 USCA §3121(d) The special provision for a "companion sitting placement service" and the "Safe Haven" rule apply to FICA as well.

Federal Unemployment Tax Act ("FUTA")

The common law test applies, but special rules exist for certain types of employees generally not of concern to home care businesses (*i.e.*, traveling or city salesmen, agent or commission drivers). 26 USCA §3306(l)

Fair Labor Standards Act ("FLSA")

The definition of an "employee" under the FLSA is very expansive and broader than the common law test. 29 USCA §203(e)&(g). It has been held to be a matter of the "economic realities":

"The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service, or are in business for themselves." *Brock v. Superior Care, Inc.*, 840 F2d 1054 (2d Cir 1988)

Some of the factors considered for FLSA purposes in determining whether a person is an employee or an independent contractor are:

- The amount of the alleged contractor's investment in facilities and equipment, or his or her employment of helpers.
- The nature and degree of control retained or exercised by the principal.
- Opportunities for profit or loss.
- Permanency of the working relationship.

- The extent to which the services in question are an integral part of the employer's business.
- The degree of independent initiative, judgement, and foresight in open-market competition with others required for the services of the independent operation.
- The degree of independent business organization.

See, e.g., *W&H Opinion Letter No. 832* (June 25, 1968); *W&H Opinion Letter No. 1029* (September 12, 1969)

State Unemployment Compensation.

A state's unemployment compensation statute often establishes specific statutory requirements that must be met for someone to be an independent contractor. In other words, the test may be established by statute rather than being the common law test.

For example, Indiana's unemployment compensation law defines "employment" as:

"...Services performed by an individual for remuneration shall be deemed to be employment subject to this article irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the board that (A) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract of service and in fact; (B) such service is performed outside the usual course of the business for which the service is performed; and (C) such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed; or is a sales agent who receives remuneration solely upon a commission basis and who is the master of his own time and effort." IC 22-4-8-1(a)

Anti-Discrimination Laws.

The specific anti-discrimination law must be consulted, but, generally, the test is broader than the common law test. While there needs to be at least some indicia of an employment relationship, it usually does not need to be concrete.

Payment of wages and control over work activities are particularly significant, but mere exercise of control over some aspect of the job can be sufficient to establish an employment relationship for anti-discrimination purposes:

- A firm that exercised control over labor conditions or an independent contractor's employees in setting up work schedules, in determining the number of employees required to meet those schedules, and in directing work of the employees in question was considered an employer of those workers. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1974)

- A hospital was held to be the employer of a nurse where the hospital controlled access of the nurse to patients who paid the nurse themselves. *Silbey Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973)
- In determining whether a business relationship is one of employee-employer, the courts look to the “economic realities” of the relationship and the degree of control the employer exercises over the alleged employee.” *Unger v Consolidated Foods Corporation*, 657 F.2d 909 (7th Cir. 1981)

Labor Law.

The federal law governing collective bargaining (*i.e.*, the National Labor Relations Act, 29 USCA §152), merely provides that independent contractors are not “employees” within the meaning of the Act. It does not define “independent contractor”.

The National Labor Relations Board consistently applies a “right of control” test looking at whether or not the “employer” retains the right to control the manner and means by which the result is to be accomplished. This is similar to the common law test. The Board emphasizes that a person’s status depends on all the facts and circumstances of each case, and no one factor is determinative. *CCH Labor-Relations* ¶1680.

Employee Retirement Income Security (“ERISA”).

The common law test applies. *Nationwide Mutual Insurance Company v Darden*, 503 U.S. 318, 112 S.Ct. 1344 (1992)

Workers Compensation.

As with unemployment compensation, state law must be consulted to determine if specific requirements must exist before someone will be considered to be an independent contractor rather than an employee. Typically, the common law test is applied. Usually, doubtful cases will be resolved in favor of employee status.

Family and Medical Leave (“FMLA”).

The test is the same as for the federal Fair Labor Standards Act, discussed above. The FMLA regulations state:

“...The definition of “employ” for purposes of the FMLA is taken from the Fair Labor Standards Act, §3(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. ... The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the [FLSA]; and that determination of the relation cannot be based on “isolated factors” or upon a single characteristic or “technical concepts”, but depends “upon the circumstances of the whole activity” including the underlying “economic reality.” In general an employee, as distinguished from an independent contractor who is

engaged in a business of his/her own, is one who “follows the usual path of an employee” and is dependent on the business which he/she serves.”
29 C.F.R. §825.105

Uniformed Services Employment and Reemployment Act Rights Act (“USERRA”)

The test for coverage under USERRA appears to be broader than the common law test. The law states:

“(3) The term ‘employee’ means any person employed by an employer. ...

(4)(A) ... the term ‘employer’ means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, ...” 38 USCA §4303

Immigration and Naturalization Act.

Regulations under the Immigration Act exclude independent contractors from the definition of employee. 8 C.F.R. §274a.1(f) The regulations define an independent contractor to include:

“...individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity: supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done...” 8 C.F.R. §274a.1(j).”

Comments to the regulations state this definition is “consistent with current Internal Revenue Service guidelines.”

Occupational Safety and Health.

The test is much more broad than the common law test. “The central inquiry is who controls the work environment?” *Loomis Cabinet Company v Occupational Safety & Health Review Commission*, 20 F.3d 938 (9th Cir 1994)

Malpractice/Negligence.

An employer is vicariously liable for the acts or omissions of its employees committed within the scope of their employment. Typically, the common law test will apply in determining who is an employee.

Other State Laws.

Many employment matters are governed by state, rather than federal, law. A state may have laws dealing with various aspects of the employment relationship, such as payment of wages, family and medical leave, permitted wage deductions, universal precautions, and required leaves of absence. In each case, the specific law involved must be consulted to determine what test is used to determine who is an employee or an independent contractor for purposes of that law.

Conclusion

Improper characterization of a worker as an independent contractor can have significant adverse consequences for a business. Aside from a failure to withhold employment taxes, it can lead to failure to comply with other laws applicable to the employment relationship. The financial viability of the business itself can be jeopardized.

Home care businesses should review the relationship they and their clients have with purported independent contractors to satisfy themselves that, in fact, the worker involved is an independent contractor rather than an employee. If the only reason the relationship has been characterized as independent contractor has been a desire to avoid tax withholding, participation in benefits, or another legal obligation, it is especially suspect because few, if any, of the indicia of an independent contractor may actually exist.

CAVEAT: *This paper is intended to provide accurate and authoritative information in a highly summarized manner with regard to the subject matter. The information in this paper is believed to be accurate as of March 25, 2005, but is subject to change and therefore should serve only as a foundation for further investigation and study. This paper is for educational and informational purposes only, is not intended to be legal advice, and should not be used for legal guidance or to resolve specific legal problems. In all cases, agencies should seek legal advice applicable to their own specific circumstances.*

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IRS Guidelines to Determine if an Individual is an Employee or an Independent Contractor

In determining whether an individual is an employee under the common law rules, twenty factors have been identified by IRS as indicating whether sufficient control is present to establish an employer-employee relationship. See Rev. Rul. 87-41, 1987-1 C.B. 296. The twenty factors were developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. No one factor or combination of factors is necessarily determinative. The twenty factors identified by IRS are described below:

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, 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.
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.
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.
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.
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 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 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.
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. 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.
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 pattern 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, however, if such person or persons retain the right to do so.
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 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. (Author's Note: This does *not* mean paying on a per visit basis is enough by itself to make someone an independent contractor.)
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.
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.

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. 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. 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. 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.
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.
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.

IRS Safe Haven

Section 530 of the Revenue Act of 1978, as amended states:

(a) Termination of certain employment tax liability.

(1) In general. If—

- (A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and
- (B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee, then for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

(2) Statutory standards providing one method of satisfying the requirements of paragraph (1).

For purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following:

- (A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;
- (B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or
- (C) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.

(3) Consistency required in the case of prior tax treatment.

Paragraph (1) shall not apply with respect to the treatment of any individual for employment tax purposes for any period ending after December 31, 1978, if the taxpayer (or a predecessor) has treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for any period beginning after December 31, 1977.

(4) Refund or credit of overpayment.

If refund or credit of any overpayment of an employment tax resulting from the application of paragraph (1) is not barred on the date of the enactment of this Act [Nov. 6, 1978] by any law or rule of law, the period for filing a claim for refund or credit of such overpayment (to the extent attributable to the application of paragraph (1)) shall not expire before the date 1 year after the date of the enactment of this Act [Nov. 6, 1978].

(b) Prohibition against regulations and rulings on employment status.

No regulation or Revenue Ruling shall be published on or after the date of the enactment of this Act [Nov. 6, 1978] and before the effective date of any law hereafter enacted clarifying the employment status of individuals for purposes of the employment taxes by the Department of the Treasury (including the Internal Revenue Service) with respect to the employment status of any individual for purposes of the employment taxes.

(c) Definitions.

For purposes of this section—

(1) Employment tax.

The term ‘employment tax’ means any tax imposed by subtitle C of the Internal Revenue Code of 1986 [formerly I.R.C.1954, section 3101 et seq. of this title].

(2) Employment status.

The term ‘employment status’ means the status of an individual, under the usual common law rules applicable in determining the employer-employee relationship, as an employee or as an independent contractor (or other individual who is not an employee).

(d) Exception.

This section shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

(e) Special rules for application of section.

(1) Notice of availability of section.

An officer or employee of the Internal Revenue Service shall, before or at the commencement of any audit inquiry relating to the employment status of one or more individuals who perform services for the taxpayer, provide the taxpayer with a written notice of the provisions of this section.

(2) Rules relating to statutory standards.

For purposes of subsection (a)(2)—

- (A) a taxpayer may not rely on an audit commenced after December 31, 1996, for purposes of subparagraph (B) thereof unless such audit included an examination for employment tax purposes of whether the individual involved (or any individual holding a position substantially similar to the position held by the individual involved) should be treated as an employee of the taxpayer,
- (B) in no event shall the significant segment requirement of subparagraph (C) thereof be construed to require a reasonable showing of the practice of more than 25 percent of the industry (determined by not taking into account the taxpayer), and
- (C) in applying the long-standing recognized practice requirement of subparagraph (C) thereof—
 - (i) such requirement shall not be construed as requiring the practice to have continued for more than 10 years, and
 - (ii) a practice shall not fail to be treated as long-standing merely because such practice began after 1978.

(3) Availability of safe harbors.

Nothing in this section shall be construed to provide that subsection (a) only applies where the individual involved is otherwise an employee of the taxpayer.

(4) Burden of proof.

(A) In general. If—

- (i) a taxpayer establishes a prima facie case that it was reasonable not to treat an individual as an employee for purposes of this section, and
- (ii) the taxpayer has fully cooperated with reasonable requests from the Secretary of the Treasury or his delegate,

then the burden of proof with respect to such treatment shall be on the Secretary.

(B) Exception for other reasonable basis.

In the case of any issue involving whether the taxpayer had a reasonable basis not to treat an individual as an employee for purposes of this section, subparagraph (A) shall only apply for purposes of determining whether the taxpayer meets the requirements of subparagraph (A), (B), or (C) of subsection (a)(2).

(5) Preservation of prior period safe harbor. If—

- (A) an individual would (but for the treatment referred to in subparagraph (B)) be deemed not to be an employee of the taxpayer under subsection (a) for any prior period, and
- (B) such individual is treated by the taxpayer as an employee for employment tax purposes for any subsequent period,

then, for purposes of applying such taxes for such prior period with respect to the taxpayer, the individual shall be deemed not to be an employee.

(6) Substantially similar position.

For purposes of this section, the determination as to whether an individual holds a position substantially similar to a position held by another individual shall include consideration of the relationship between the taxpayer and such individuals.



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