

Internal Revenue Service

A stylized American flag with a blue field of white stars and red and white stripes, waving on a yellow pole. The flag is set against a background of several large, semi-transparent purple circles. The text 'FEDERAL, STATE AND LOCAL GOVERNMENTS (FSLG)' is overlaid in the center in a bold, blue, sans-serif font.

**FEDERAL, STATE AND
LOCAL GOVERNMENTS
(FSLG)**

Independent Contractor vs. Employee

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Misclassification of Workers

- If you classify a worker as independent without reasonable basis you may be held liable for employment taxes for that worker.
- Before you know how to treat payments to a worker understand common law and statutory definitions of workers to avoid future problems.



Publication 1779

- This publication helps you correctly classify a worker as either an independent contractor or an employee.

Publication 963



- This publication covers worker status, public retirement systems, Social Security and Medicare coverage and benefits, Section 218 Agreements, employment tax laws and other tax issues unique to tax-exempt entities that are also government entities.

Publication 15-A



- Pub 15-A provides supplementary tax information to employers. It provides a detailed discussion of how to determine worker status and the risks of misclassifying workers.

Independent Contractor or Employee?

Determining Factors:

- Behavioral Control - How, when and where to do the work; tools to use; where to purchase supplies; who to hire; training
- Financial Control - Significant investment, not reimbursed for expenses, responsible for profit and loss
- Relationship of the Parties - Facts that illustrate how the entity and the worker perceive their relationship; employee benefits provided, written contracts that show what is intended

Independent Contractors

An Independent Contractor might...

- ***Make own schedule***
- ***Provide staff***
- ***Buy own products***
- ***Have business telephone***
- ***Furnishes supplies & equipment***
- ***Have business liability insurance***
- ***Seeks a profit and risks loss***





Employees

An Employee might...

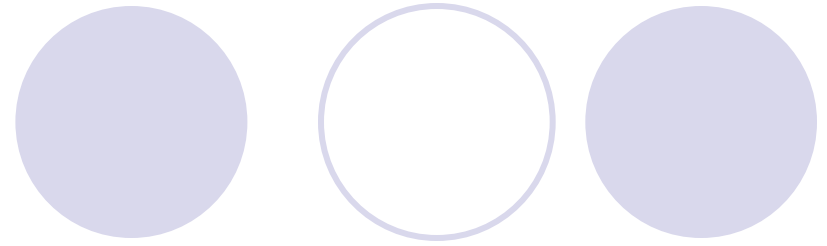
- ***Wear I.D./Uniform***
- ***Work hours/days determined by payor***
- ***Trained by the payor***
- ***Use supplies & equipment & staff provided by payor***
- ***Inclined to quit without obligation***
- ***Follow internal policy/procedures***

Legal Basis

● **Common-Law Standard Employee**

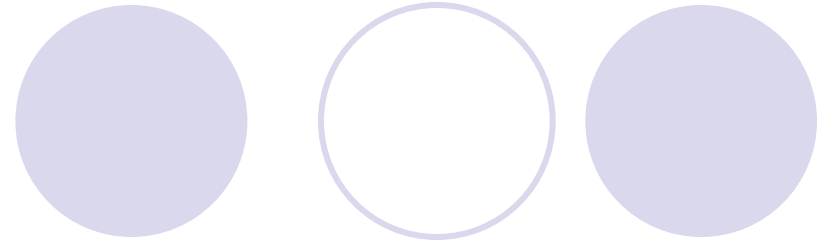
- For employment tax purposes defined IRC 3121(d)(2) “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”.
- The common-law rule for determining whether a worker is an employee is whether the entity has the right to direct and control the worker as to the manner and means of the worker’s job performance.

Legal Basis



- Statutory Employee
 - Some workers that are independent under Common Law rules are employees by statute:
 - Drivers distributing beverages, meat, produce, bakery/Full-time life insurance sales agent
 - Home worker following your specifications to modify goods/materials supplied by you.

Legal Basis



- Statutory Nonemployee
 - Direct Sellers, licensed real estate agents and certain companion sitters



Behavioral Control

- When and Where
- Tools & Equipment
- Workers to hire
- Where to purchase supplies/services
- Specifying who performs work
- Specifying order or sequence
 - Even if no instructions are given, the RIGHT to control can be sufficient.



Financial Control

- Unreimbursed fixed expenses?
- Significant investment in facilities
- Available to the relevant market, seeking business opportunities?
- How is the worker paid?
- The extent to which the worker can realize a profit or loss



Relationship Control

- Written contracts describing the intended relationship
- Employee type benefits?
- Permanency of the relationship
- Services performed a key aspect of the work of the entity?

Worker Classification



- Positions Unique to Government Entities
 - Elected Officials
 - Public Officials
 - Volunteer Firefighters
 - Election Workers
 - Emergency Services
 - Appointed Officials

Elected And Appointed Officials

- Employee

- Position established by law
- Duties defined by statute
- Performs duties as a public official
- Responsible to the public
- Paid out of governmental funds

Elected And Appointed Officials

- Examples of Elected and Appointed Officials
 - Mayor
 - City Attorney
 - Judge or Justice of the Peace
 - Building Inspector
 - Board Members
 - Road Commissioner
 - Animal Control Officer

Elected And Appointed Officials

- Attorneys/Municipal Attorneys
 - Employee ~ If the right to direct and control exists
 - May be considered holder of public office
 - Payment reported on Form W-2
 - Form W-2 **and** Form 1099-MISC unlikely
 - May be contractual relationship



Elected And Appointed Officials

- *Always* employees for income tax withholding
- *May be* employees for social security purposes (Refer to the Section 218 agreement)
- Do not issue Form 1099-MISC in lieu of Form W-2

Volunteer Firefighter



- Employee

- Ongoing agreement with entity
- On-call for regular and routine duties
- Works regularly but intermittently
- Required to participate in training
- Routine “emergency” services
 - Duties include responsibility for non-routine situations
 - Building fires
 - Widespread fires caused by rioters
- Reimbursement of expenses
 - Nominal reimbursement for actual expenses
 - Accounted to the employer per Reg. 1.62.2
 - Excludible from W-2 wages

Volunteer Firefighter



- Employees for federal tax purposes but may not be employees for federal labor law or state tax purposes
- Any manner of payment is wages
- Wages are subject to *all* federal employment tax withholding
- Nominal amounts (up to \$30/month) may be excludable from wages

Emergency Services

- Nonemployee
 - Non-routine “emergency” services
 - Natural disasters
 - Tornado, earthquake, floods
 - State National Guard members called to serve
 - Tornado at Spencer, SD
 - Major forest fires
 - Temporary basis
 - Mandatory exclusion by Federal law



Not Sure Yet?

- Complete **Form SS-8** and send to:

Internal Revenue Service
SS-8 Determinations
P.O. Box 123
Stop 4106 AUCSC
Austin, TX 78767

If Payment Made To An Independent Contractor

Forms and Filing Requirements:

- Secure *W-9* before payments to any Vendor
- File Form 1099-MISC and 1096
- Form 945 for Backup Withholding of Tax

If Payment Made To An Employee

Forms and Filing Requirements:

- Secure W-4 *before* paying employees
- File Form W-2 and W-3
- Form 941 for Employment Tax Withholding

Reference Materials



- Publication 15, “*Circular E, Employer’s Tax Guide*” and Publication 15-A, “*Employer’s Supplemental Tax Guide*”
- Publication 963, “*Federal-State Reference Guide*”
- *Publication 1779 “Independent Contractor or Employee?”*
- Form SS-8, “*Determination of Worker Status...*”

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Independent Contractor or Employee?

Thank You
Thank You