

**CCH-EXP, TAX RESEARCH CONSULTANT, PLANIND: 9,102 Determining Status as Employee or Independent Contractor**

© 2007, CCH INCORPORATED. All Rights Reserved. A WoltersKluwer Company

**Determining Status as Employee or Independent Contractor**

The IRS has identified 20 factors that can be used to determine whether an individual is an independent contractor or effectively an "employee."<sup>1</sup>

The determination of independent contractor versus employee status is based on all of the facts and circumstances surrounding the relationship. These factors seek to determine whether there is behavioral and financial control of the worker. None of the identified factors is determinative. In addition, not all factors are present in all employee or independent contractor relationships.

The factors are listed below, with an explanation of whether they tend to indicate an employer-employee or an independent contractor status.

- *Control of when, where, and how the worker performs services.* Provision of instructions regarding when, where, and how the worker is to work is indicative of an employer-employee relationship. Independent contractors tend to have control of the time, place, and method at and by which the worker performs job obligations.
- *Training.* Training, requiring services to be performed with other workers, and requiring the worker to attend meetings, are indicative of an employer-employee relationship.
- *Integration into firm operations.* The integration of a worker's services into the operations of the business indicates the direction and control generally found in an employer-employee relationship.
- *Requirement that services be personally performed.* Limited identity of the service provider is indicative of an employer-employee relationship. Independent contractors are often not required to personally perform the services. However, there are exceptions and this factor alone is often not determinative.
- *Control over assistants.* An employer-employee relationship is indicated when the firm has the right to hire, supervise, and pay the worker's assistants.
- *Length of relationship.* A long-term continuing relationship indicates an employer-employee relationship. However, this factor alone is not enough to determine the degree and extent to which the employer exercises control.
- *Work schedule.* A worker given a set work schedule indicates the control of an employer in an employer-employee relationship.
- *Number of hours of service required.* The amount of time the worker is required to provide services to the employer is indicative of the worker's status. Full-time employment and firm control over time spent working are indicative of an employer-employee relationship. Provision of services part-time while performing services for others is indicative of a lack of control, suggestive of an independent contractor relationship.
- *Location where services are performed.* The requirement that services be provided on the firm's premises suggests an employer-employee relationship. However, some types of services or work cannot be performed elsewhere, such as improvements to the firm's facilities. This factor alone is not determinative.

- *Control over technique or sequence.*  
Control of the order or sequence in which the worker performs required tasks suggests an employer-employee relationship exists. When the worker determines how and in what order tasks will be performed, it is less indicative of an employer-employee relationship.
- *Reports to firm.* Submission of regular or periodic oral or written reports suggests that there is a degree of control indicative of an employer-employee relationship. However, the requirement that progress reports be made might not be enough by itself to establish an employer-employee relationship.
- *Payment method.*  
The interval of payment may be indicative of an employer-employee relationship. Payments by the hour, week, or month suggest that an employer-employee relationship may exist. Payment by the job or based on invoices submitted by the worker are indicative of an independent contractor relationship.
- *Work-related expenses.*  
Payment of the worker's business and travel expenses suggests an employer-employee relationship. However, reimbursement of business and travel expenses pursuant to a contract might just be part of the arrangement between an independent contractor and the firm.
- *Tools.* Whether the worker is required to furnish her own tools is an important consideration. Provision of necessary tools and equipment by the firm suggests that there is an employer-employee relationship. However, the fact that a worker supplies or is required to supply her own tools and equipment is not necessarily determinative.
- *Work facilities.*  
Investment in and provision of work facilities by the worker, especially if of a type not generally maintained by employees, indicates an independent contractor relationship.
- *Profit and loss potential.*  
Workers likely to profit from the success of an enterprise and at risk of experiencing a loss on its failure are usually independent contractors. Workers paid a fixed rate based on time with no possibility of loss are more likely employees.
- *Multiple employers.* The presence of multiple employers, rather than employment by a single firm, is indicative of a worker having an independent contractor status.
- *Restrictions on customers and clients.*  
Workers who offer their services to the public on a regular, consistent basis are less likely to be employees than those with a single employer. Workers significantly restricted as to the identity of those for whom they can work are probably employees.
- *Termination of worker.* The firm's ability to terminate its relationship with the worker for any reason without penalty indicates an employer-employee relationship. The availability to the worker of penalties if termination is without cause may indicate more independence, as would be expected of an independent contractor.
- *Termination of relationship by worker.*  
The worker's ability to end the relationship at any time without penalty is indicative of an employer-employee relationship. Liability to the worker for terminating the relationship without cause or for reasons not permitted by the agreement may indicate an independent contractor relationship.<sup>2</sup>

#### COMMENT

Danshera Cords, J.D., LL.M., Associate Professor of Law, Capital University Law School, Columbus, Ohio: The provision of personal services by a specific individual is often what creates the value of the services. Therefore, in some instances, the fact that the services must be performed by only one individual is not determinative of an employment relationship. Common examples include services that require that worker receive a security clearance or

services that are artistic or personal in nature. In these instances, the performance of work by a substitute might not in fact be the same as performance by the contracted worker.

Another means to determine status as an employee or an independent contractor has been adopted by the Tax Court. The Tax Court considers seven factors, which are:

- The degree of control exerted by the employer over the worker.
- The worker's investment in work facilities.
- The worker's potential to experience profit or loss.
- The ease to the employer of discharging the worker.
- The degree to which the work performed is integral to the principal function of the employer.
- The permanent or temporary nature of the relationship.
- The parties' understanding regarding the nature of the relationship.<sup>3</sup>

See COMPEN: 3,102, discussing employees versus independent contractors.

**Checklist: Independent Contractor Versus Employee**

The following checklist may help determine whether an individual's relationship with an employer is a true independent contractor relationship or an "employment-style" arrangement. If a relationship is more like an employment relationship, the employer may be responsible for more obligations to the "employee." Check each statement that is true, remembering that no single issue is dispositive.

- The employer controls the time, place, and manner of the work.
- The employer provides or requires training, or requires attendance at training meetings.
- The employer integrates the worker into regular operations.
- The employer requires that the worker specifically perform the work.
- The employer hires and controls the worker's assistants.
- The employer and the worker have a long-term working relationship.
- The employer requires the worker to work certain hours or a certain schedule.
- The employer requires a certain number of hours.
- The employer requires work at a specific location.
- The employer controls the order of the work or the technique used.