

INDEPENDENT CONTRACTORS vs. EMPLOYEES
By Roben D. Hunter, JD, CPA, CVA, CFFA, Hunter Advisors, PLLC

For many years the IRS has been scrutinizing the distinction between Independent Contractors and Employees for businesses. Business owners would prefer the workers categorized as independent contractors. Some of the reasons are as follows:

- Independent contractors are not covered by workers' compensation or unemployment;
- Businesses do not need to withhold payroll tax on the earnings of independent contractors;
- Businesses do not have to adhere to labor laws or anti-discrimination laws that cover employees;
- Businesses do not provide benefits to independent contractors but do for many employees.

However, businesses may get hurt by misclassifying an employee as an independent contractor. The business could be subject to employment taxes as well as penalties for such misclassifications not to mention the costs associated with defending your position. The IRS has created a list of considerations that will help the business determine if an individual worker should be considered an Independent Contractor or an Employee, including:

1. Does the employer give the worker instructions as to when, where and how to work? The more specific the instructions, the more likely the worker will be considered to be an employee.
2. What training does the employer give the worker? Usually training is affiliated with an employee relationship.
3. Are all the workers expenses reimbursed? Many times, an independent contractor will cover their own expenses.
4. Does the worker maintain their own equipment to do the task at hand, or does the worker use the employer's equipment? More often than not, an independent contractor maintains their own equipment.
5. Is the worker working exclusively for the employer? Many times an independent contractor will work for more than one business performing the same duties.
6. Does the employer pay the worker by the job or hourly? Typically an employee will be paid hourly or salaried, whereas an independent contractor will be paid by the job.
7. Will the worker make a profit or incur a loss on the project? If so, this is a good indication of the worker being an independent contractor.
8. Is there a written document setting forth the terms of the agreement and describing the relationship between the worker and the employer?

9. Does the employer provide the worker any benefits, such as vacation, insurance or a pension plan? Usually, those benefits would more likely lean towards an employee relationship.
10. Do the terms of the relationship define how long the relationship is to last? Usually, an employee relationship will be “at will” and be considered ongoing, whereas an independent contractor relationship will be for a specified period of time.
11. What services does the worker provide for the business? If the worker provides services that are normal and customary, needed regularly to operate the business, it will lean the relationship toward an employee relationship. However, if the services are cyclical, seasonal, or arbitrary, needed only once in a while, the relationship could be considered an independent contractor relationship.

Many of the cases that have been determined on this issue seem to come down to the amount of control the employer has over the worker. The eleven items above can basically be listed as a way to determine how much control the employer has over the worker. The more control the employer has, the more likely they will be considered an employee.

Businesses should determine this issue carefully with each worker. It should be documented that the business has looked at this issue and it has been resolved, either with an employment agreement or an independent contractor agreement.