

Determination of Independent Contractor Status

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To determine whether an individual is an employee or an independent contractor, the relationship of the worker and NSHE must be examined. All evidence of control and independence must be established based on the behavioral control, financial control, and type of relationship.

- **Behavioral control** refers to whether NSHE has the right to direct and control how the worker does the task: instructions about when, where, and how to work, and training provided to the worker.
- **Financial control** refers to the extent NSHE can control the business aspects of the worker's job: extent to which the worker has unreimbursed business expenses, extent of the worker's investment, extent to which the worker makes services available to the general public, how the business pays the worker, i.e., by the hour, week, month, or lump sum by the job, and the extent to which the worker can realize a profit or loss.
- **Type of relationship** refers to factual substantiation of the relationship: whether written contracts exist, whether NSHE is to provide the worker with employee-type benefits like insurance, vacation, or sick pay, whether the relationship is to be ongoing, i.e., indefinite, and the extent to which services performed are an important part of regular business activity of NSHE.

Although the ideas behind these concepts are simple, application of the rules is not always clear and concise. Independent contractor determinations are based on facts and circumstance. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. No mathematical formula or weighting system can be applied to the factors, and no one factor is decisive. It does not matter if a written agreement takes a position or states that certain factors do not apply if the facts indicate otherwise. The issue of control is based on the preponderance of the factors, and all relative facts must be taken into account in the determination. Refer to the IRS website, ([WEB](#)) and Form SS-8 ([PDF](#)).

OLD: The Common Law 20 Question Test

The IRS provides resources on their website ([WEB](#)) on the subject of independent contractors. Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, is used when entities are requesting the IRS to determine the status of a worker for federal employee taxes and income tax withholding purposes. The IRS lists 55 specific questions in Form SS-8 that includes aspects of their old Common Law 20 Question Test in determining independent contractor status. The old 20 question test consisted of the following questions.

- Risk of Profit or Loss: Independent contractors realize a profit or sustain a loss based on their success in performing the work or service.
- Continuing Relationship: The relationship between an independent contractor and an employer ends when the job is done.
- Compliance with Instructions: Independent contractors cannot be told when, where, or how to do the job.
- Training: Independent contractors do not go through any type of instructional training period with a more experienced employee to learn how to do the job. Independent contractors specialize in the field in which you have employed them and do not need to be trained.
- Personal Service Required: The right of an independent contractor to substitute another's services without the employer's knowledge shows that the employer is not requiring one individual's personal services.
- Integration into Business: The success or continuation of the business is not dependent on the independent contractor's performance of the service.
- Control over Hiring, Supervising, and Paying of Assistants: An independent contractor maintains control of his/her assistants. The employer contacts the independent contractor

if there is a problem, and the employer pays the independent contractor for the work done. Then, the independent contractor pays the assistants directly.

- **Set Hours of Work:** The independent contractor establishes his/her own hours of work.
- **A Full-Time Work Requirement:** An independent contractor has the availability to work for more than one client.
- **Working for More Than One Firm:** An independent contractor has an established business in which they work for more than one firm.
- **Worker's Availability to the General Public:** An independent contractor makes services available to the public on a regular and consistent basis.
- **Working on the Employer's Premises:** An independent contractor, unless the nature of the service requires works off-premises.
- **Required Work Order or Sequence:** An independent contractor does not need to be told in what order to do the job. He/she has been contracted with as one that is an expert in this field and does not need to be told how to do the job.
- **Required Reports:** An independent contractor is not required to submit oral or written reports.
- **Payment by the Hour, Week, or Month.** An independent contractor is paid in a lump sum fee basis when the job is done. An invoice must be generated to substantiate the payment.
- **Payment of Business or Travel Expense:** An independent contractor is responsible for his/her own business or travel expense. If paid by an employer, the employer must include in the independent contractor's 1099 except when the employee can verify the accountable plan rules.
- **Furnishing of Tools and Materials:** An independent contractor has the necessary tools and materials to do the job.

- Investment in Facilities: If the independent contractor maintains an office on the employer's premises, he/she pays a rent or lease payment for the office space as well as overhead.
- Employer's Discharge Rights: An independent contractor cannot be terminated as long as they are fulfilling the contract.
- Worker's Termination Rights: An independent contractor could be held financially responsible for any loss the employer may suffer if he/she does not fulfill his/her contract.